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Younger v. Harris: Federalism in Context

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Younger v. Harris[1] is one of the United States Supreme Court's

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1. 401 U.S. 37 (1971). Five companion cases round out the "*Younger* sextet": Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

Many commentators have analyzed the *Younger* doctrine. *See* Abrahams & Mattis, *The Duty to Decide vs. The Daedalian Doctrine of Abstention*, 1 U. PUGET SOUND L. REV. 1 (1977); Aldisert, *On Being Civil to Younger*, 11 CONN. L. REV. 181 (1979); Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L.Q. 11 (1971); Dittfurth, *The Younger Abstention Doctrine: Primary State Jurisdiction over Law Enforcement*, 10 ST. MARY'S L.J. 445 (1979); Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO L.J. 744 (171); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 SW. L.J. 282 (1972); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193; Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEX. L. REV. 1324 (1972); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970); McMillan, *Abstention—The Judiciary's Self-Inflicted Wound*, 56 N.C. L. REV. 527 (1978); Pell, *Abstention—A Primrose Path by Any Other Name*, 21 DE PAUL L. REV. 926 (1972); Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978); Sedler, *Younger and Its Progeny: A Variation on the Theme of Equity, Comity and Federalism*, 9 U. TOL. L. REV. 681 (1978); Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1; Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977); Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974) (hereinafter cited as Wechsler); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*,

most important decisions of the 1970's. In *Younger*, the Court disapproved a federal injunction against a state criminal prosecution that was alleged to violate first amendment rights. The Court, the lower courts, and the commentators still are attempting to define *Younger*'s meaning and its application beyond its obvious boundaries. This uncertainty and confusion have resulted largely from the Court's unwillingness to place *Younger* in an historical and policy context. For the most part, the Court's guidance has been limited to strictures against federal injunctive intrusion into state court criminal proceedings. This reluctance to intervene has been explained in vague references to "Our Federalism," a concern for the independence of the states and their court systems.

The courts and the commentators have failed to see the *Younger* cases as specific applications of broad themes that have continually perplexed American courts. These themes are not peculiar to the relations of federal and state courts in a dual-court system. Nor are these themes peculiar to the relation of equitable relief and the criminal process. If the courts would relate applications of *Younger* to broader themes, the outcome in a case controlled by *Younger* would be more predictable and, after disposition, more convincing.

In any court system, state or federal, courts attempt to avoid duplicative litigation. If a dispute can be resolved with one lawsuit instead of two or more, a court will desire to resolve the dispute in one lawsuit.

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53 N.C. L. REV. 591 (1975); Wilkinson, *Anticipatory Vindication of Federal Constitutional Rights*, 41 ALB. L. REV. 459 (1977); Zeigler, *An Accomodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976); Comment, *Closing the Courthouse Door: The Expanding Rationale of Younger Abstention*, 19 B.C.L. REV. 699 (1978); Comment, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 CALIF. L. REV. 1318 (1979); Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523; Comment, *Federal Declaratory Relief from Unconstitutional State Statutes: The Implications of Steffel v. Thompson*, 9 HARV. C.R.-C.L. L. REV. 520 (1974); *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274-1330 (1970); Comment, *Federal Injunctive Relief Against State Court Criminal Proceedings: From Young to Younger*, 32 LA. L. REV. 601 (1972); Note, *Federal Injunctions and State Criminal Prosecutions: Vestiges of "Our Federalism,"* 21 CLEV. ST. L. REV. (No. 1) 165 (1972); Note, *Federal Courts—Younger Doctrine—State Criminal Defendant Must Exhaust State Appellate Remedies Before Seeking Federal Relief on Matters Collateral to the Merits of State Prosecution—New Jersey v. Chesimard*, 52 N.Y.U.L. REV. 1212 (1977); Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U.L. REV. 870 (1975); Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe*, 48 N.Y.U.L. REV. 965 (1973); Note, *Younger Abstention: The Path of Federal Non-Interference in State Court Proceedings—Comity and Federalism*, 5 OHIO N. U.L. REV. 658 (1978); *see also* Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369.

The desire to avoid duplicative litigation may compete with another theme that is not unique to a dual-court system: the desire to avoid inequity that the litigation process itself may impose upon a party. The normal course of trial and appeal, intended to protect legal rights, may, in some rare instances, operate to deprive a person of legal rights. In these situations, extraordinary relief is necessary and can be granted; the relief comes, however, at the expense of duplicating and interfering with another court's efforts.

This tension can exist in a unitary court system. Moreover, the tension may manifest itself in the context of purely civil litigation. The courts have struggled with this tension both in the setting of a unitary court system and in the setting of purely civil litigation. The path of the decisions has been uneven, but they offer helpful guidance.

Federal court intervention in state criminal proceedings is a more specific application of these themes. In the past, the Supreme Court's decisions have drawn on this tradition; even when not explicitly noting the parallels, the Court's decisions have paralleled the treatment given to the broader problems.

The *Younger* line of decisions has been inattentive to the rich body of law on which it might draw. The general allusions to "Our Federalism" are a poor substitute for a reasoned and explicit consideration of the tension between the broad themes already noted. The Court's *Younger* decisions have sanctioned intervention when, under *Younger*, approval of intervention would be unlikely. By contrast, these instances of intervention seem quite sensible if one considers the broader themes. The Court has also refused to intervene in cases in which, because of history and policy, it should have intervened.

As the Court has not given a broad consideration to the *Younger* problem, it has created uncertainty about *Younger*'s "extension" to purely civil litigation. The very statement of the problem implies that the *Younger* doctrine is a specialized island that has no immediately discernible bridges to the mainland. Stated in these misleading terms, the courts have given uncertain, contradictory responses. It is difficult to build a bridge if one does not know where the mainland is or even that the mainland exists. Until the federal courts determine how they regard duplication of the work of the state courts, they will have difficulty deciding whether to "extend" *Younger* to state civil litigation.

This Article begins with a critical discussion of the broad themes as they arise in both a unitary and a dual court system and in the framework of purely civil litigation. It then relates to these themes the pre-*Younger* decisions on federal intervention into state criminal pro-

ceedings. *Younger* and post-*Younger* cases are measured against these earlier decisions. Old law is not better, but provides valuable insights into the classic, recurring problems of which post-*Younger* cases have failed to take advantage. The Article concludes with an examination of *Younger* as it relates to state civil litigation.

Duplicative or Overlapping Proceedings

The Supreme Court often has vacillated with respect to the meaning of duplicative litigation in the context of simultaneous litigation in federal and state court systems, sometimes limiting the category to cases with strict identity of parties and issues,[2] but more frequently including cases that present a similarity of core issues.[3] The Court disapproves of duplicative litigation, however it is defined. Coordination of duplicative litigation has been developed in many contexts other than the protection of federal civil rights against state action. In these broader contexts, problems have arisen ever since the establishment of concurrent jurisdiction, and the solutions are even now in a state of flux. The discussion that follows first considers the treatment of duplicative proceedings[4] within a single court system, emphasizing duplicative proceedings pending in separate districts within the federal court system. Duplicative proceedings that are lodged simultaneously in a state court and in a federal court are then analyzed.

Within a Unitary Court System

Duplicative proceedings within a single court system generally have been held in disfavor.[5] They may harass a party by forcing inconvenient and expensive participation in more than one lawsuit.[6] They may call for an unnecessary and inefficient use of scarce judicial re-

2. *E.g.*, Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1865). For a discussion of *Buck*, see text accompanying notes 57-61 *infra*.

3. *E.g.*, Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867). For a discussion of *Rickey Land & Cattle Co.*, see notes 68-70 & accompanying text *infra*.

4. The phrase "duplicative proceedings" is ambiguous. It could refer to identical lawsuits and to lawsuits that call for only partial duplication of efforts, because they relate to common, though not identical, issues. Because the cases have expanded relief to cover both meanings, the phrase as used in this Article includes both meanings. "Overlapping proceedings" is used also to denote the second meaning of duplicative proceedings.

5. *See* Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960); Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961).

6. The party filing duplicative lawsuits sometimes has a legitimate reason for doing so and has no intent to harass, even though this may be the effect. *See* Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525, 526-28 (1960).

sources.[7] They also may lead to conflicting judgments that create confusion for the parties and undermine respect for the courts.[8]

Early cases allowed a plea in abatement dismissing a later-filed duplicative lawsuit.[9] The plea in abatement was granted only if the two lawsuits had identical parties, causes of action, and remedies sought.[10] With these stringent requirements, the plea was seldom appropriate. While some courts relaxed or misapplied the strict requirements for abatement,[11] others, recognizing that duplication short of true identity called for relief even though abatement would be improper, developed the use of the stay. Rather than dismiss the later-filed action, the second court would stay its proceedings to await the outcome of the first action.

Hurd v. Moiles[12] illustrates this development. Mortgagors filed suit in federal court for an accounting under their mortgage and a cancellation of the mortgage and notes. The defendant-mortgagees in that suit filed a second suit in federal court against the mortgagors, seeking foreclosure of the mortgage.[13] Although a judgment for the defendant-mortgagees in the first suit would not provide them with the relief they sought in the second suit, it would create an estoppel in their favor. Thus, although the two lawsuits were not identical, they shared core issues. The second court acknowledged that it could not properly sus-

7. *See* P. Beiersdorf & Co. v. Duke Laboratories, Inc., 92 F. Supp. 287, 288 (S.D.N.Y. 1950).

8. Whichever action first comes to final judgment should have a preclusive effect. If an appeal or appeals are taken, however, both judgments could be outstanding, and neither would have a preclusive effect. *See* RESTATEMENT OF THE LAW OF JUDGMENTS § 41, Comment d; 2 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 722 (5th ed. 1925).

9. Traditionally, the second suit, not the first, was abated. Kirman v. Borzage, 89 Cal. App. 2d 898, 202 P.2d 303 (1949); McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952). Some courts allowed the plaintiff to avoid abatement by dismissing his or her first action. Fontaine v. Peddle, 144 Me. 214, 67 A.2d 539 (1949); Stahler v. Sevinor, 324 Mass. 18, 84 N.E.2d 447 (1949). *But see In re* Georgia Power Co., 89 F.2d 218 (5th Cir. 1937) (dismissal would have prejudiced defendant).

10. *See* The Haytian Republic, 154 U.S. 118 (1894); J. KOFFLER & A. REPPY, HANDBOOK OF COMMON-LAW PLEADING § 206, at 420 & n.53 (1969); B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 225, at 390 & n.19 (3d ed. 1923).

11. In State *ex rel.* Green Mountain Lumber Co. v. Superior Court, 145 Wash. 532, 261 P. 97 (1927), a mortgagor filed suit against his mortgagee in one county. The mortgagee then brought a foreclosure action in another county. The court held that abatement should have been granted. Under the strict identity test, however, abatement was not proper, although a stay order may have been appropriate. For a discussion of *Green Mountain Lumber*, see Note, 41 HARV. L. REV. 661 (1928).

12. 28 F. Supp. 897 (W.D. Mich. 1886).

13. The mortgagees filed their suit in the district where the land was located, probably believing themselves compelled to bring their "local" action in that district. *See* Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

tain a plea in abatement because the lawsuits were not identical, but stayed further action until the first action had concluded. *Hurd* thus set forth a preference to allow the lawsuit that was filed first to proceed.[14]

If a choice must be made between two suits, either one of which presents an unacceptable level of duplication, priority in filing may be the only neutral basis of choice. When the two lawsuits are truly identical, a "first-filed" rule is defensible. The second lawsuit, when filed by the same plaintiff, usually suggests harassment.[15] If, on the other hand, it merely indicates poor planning by the plaintiff, the defendant may rightfully insist that the plaintiff be held to his or her initial choice, especially after the defendant has incurred expenses for the first suit.

When the two lawsuits are not identical, a "first-filed" rule is also justifiable. A filing of a second lawsuit by the defendant in the first lawsuit, which presents the same issues as the former lawsuit, may represent an effort to defeat the plaintiff's choice of forum.

When the parties in the two lawsuits are not identical, however, other problems arise.[16] The Court, in *Landis v. North American Co.*,[17] expanded the use of stay orders to situations in which the parties are not identical. In *Landis*, two utility holding companies, in separate suits filed a day apart, sought injunctive relief in the District of Columbia against the enforcement of the Public Utility Holding Company Act of 1935.[18] On the day before one suit and on the same day as the other, the government brought suit under the statute against other companies in the Southern District of New York to compel their registration under the new Act. Numerous suits either challenging the constitutionality or seeking the application of the Act were commenced in various districts by other nonregistered holding companies. The government sought a stay of the plaintiffs' suits, representing that it would diligently prosecute its "test case" in the Southern District of New York. The government assured the parties that until the Act had been

14. The autorities cited, but not discussed, by the court had also employed a first-filed rule. 28 F. Supp. at 899. These authorities, however, merely made conclusory statements that the first court's jurisdiction becomes exclusive upon filing.

15. *See* Marconi Wireless Tel. Co. of Am. v. Kilbourne & Clark Mfg. Co., 235 F. Supp. 719 (W.D. Wash. 1916) (plaintiff enjoined from prosecuting patent infringement action against purchasers of product until determination of suit against manufacturer of product).

16. Compulsory and permissive counterclaim devices, *e.g.*, FED. R. CIV. P. 13, have largely eliminated the occasion for overlapping lawsuits when the parties are identical, but overlapping proceedings continue to create problems when the parties are not identical. In these cases, the first-filed rule has received limited, but significant, support. See text accompanying notes 17-31 *infra*.

17. 299 U.S. 248 (1936).

18. 15 U.S.C. §§ 79-79z-6 (1976 & Supp. III 1979).

upheld by the Supreme Court in the test case, it would neither initiate enforcement suits nor seek penalties for infractions of the statute committed while the test case was being litigated. The government argued that independent consideration of all suits would "clog the courts" and "overtax the facilities of the Government."[19] The District of Columbia court granted a stay until the New York test case was decided by the Supreme Court, even though neither the issues nor the parties were identical.

On review, the Court tacitly approved issuance of a stay of limited duration. The power to stay proceedings, Justice Cardozo wrote for a unanimous Court, "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[20] The government test case might have been entitled to some preference because it promised to settle and simplify many legal and factual issues. Nevertheless, the Court reasoned that, when litigants in separate proceedings are not identical, the seeker of a stay bears a heavy burden when he or she asks that a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.[21] The Court determined that a stay until all appeals in a test case had been exhausted would improperly exceed "the limits of a fair discretion."[22] The Court indicated that, at most, a stay might have been proper if limited in duration only until the proceedings in the Southern District of New York had concluded; but because the proceedings in New York were almost concluded, the court declined to pronounce upon the fairness of even such a limited stay order.

In *Landis*, because the parties were not identical, the Court allowed only a limited stay and attached no significance to the order of filing. In *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*,[23] the Court suggested that the order of filing might be significant when the parties, although not identical, have a close relationship that consists of more than a common enemy or common goals. Moreover, this close relationship might sometimes justify a stay of indefinite duration

19. 299 U.S. at 251.

20. *Id.* at 254. Justice Cardozo added, "[o]ccasions may arise when it would be a 'scandal to the administration of justice' . . . if power to coordinate the business of the court efficiently and sensibly were lacking altogether." *Id.* at 255 (quoting Amos v. Chadwick, L.R., 9 Ch. Div. 459, 462 (1878)).

21. 299 U.S. at 255.

22. *Id.* at 256.

23. 342 U.S. 180 (1952).

that can result in an estoppel in the stayed proceedings.[24]

In *Kerotest*, C-O-Two, an owner of patents brought suit in the Northern District of Illinois, charging Acme, a competitor's customer, with patent infringement. Kerotest, Acme's supplier of the goods that allegedly infringed the C-O-Two patent, then filed suit against C-O-Two in the District of Delaware for a declaration of invalidity. Faced with this development, C-O-Two added Kerotest as a defendant in the Northern District of Illinois. The district court in Delaware enjoined Kerotest's prosecution of the Illinois action, believing itself bound by circuit rulings that a prior-filed declaratory judgment action must take precedence over a later-filed action for infringement.[25] The court of appeals reversed because of the expectation that the infringement action in Chicago would proceed with dispatch.[26]

The Supreme Court approved the ruling of the court of appeals that the declaratory action in Delaware should be stayed.[27] The Court found no abuse of discretion by the Third Circuit, agreeing with the rationale that the first suit promised the most complete relief in the dispute. It refused to approve a "rigid rule" that would rest on priority of filing;[28] this refusal is understandable because each case had a strong claim to being "first." The patentee's suit was the first to place the patent in issue. The competitor's suit in Delaware was the first in which patentee and competitor formally assumed adversary positions. Thus, even though *Kerotest* in fact upheld the first plaintiff's choice of forum, the Court did not prefer the first-filed suit, whichever that might be, but preferred the suit offering the prospect of the most complete relief, thereby departing from the first-filed approach of *Hurd*.

The Court stated in dictum that had the competitor, Kerotest, filed its declaratory suit prior to the infringement action against Kerotest's customer, the Delaware court properly could have enjoined a later suit filed by the patentee.[29] The Court implicitly endorsed a first-filed rule in this instance, even though an infringement action would grant more complete relief than would a declaratory action.[30] Thus, when a party

24. *Id.* at 185-186.

25. In Crosley Corp. v. Hazeltine Corp., 122 F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942), the Third Circuit had ruled that the first suit to raise the issue of patent validity between patentee and supplier must take precedence. Under such a rule, the court of first filing should enjoin the second court.

26. 189 F.2d 31 (3d Cir. 1951).

27. 342 U.S. at 183.

28. *Id.*

29. *Id.* at 185-86.

30. A declaratory judgment in favor of the patentee would not provide complete relief, especially as to the adversary's customers. On the other hand, were the Court to grant pref-

initiates the consideration of core issues, his or her diligence secures a preference against a more comprehensive, although essentially reactive, lawsuit.[31]

For convenience and efficiency, coordinate courts in a unitary system generally approve the use of the stay, even when parties and issues are not identical. In cases that are not identical, the courts have placed less emphasis on priority of filing. On the other hand, when a more comprehensive action is subsequently brought, which raises substantially the same issues, preference for the first-filed action is likely to continue. Although a "race to the courthouse" may have a negative connotation,[32] preference on any other basis is difficult to justify. If the first to file has chosen an inconvenient forum, a change of venue and consolidation are the appropriate procedural remedies.[33]

Between a State Court System and the Federal Court System

Duplicative litigation between a state court system and the federal court system potentially allows harassment, waste of resources, and conflicting judgments. Conflicting judgments pose greater difficulties in a dual-court system than in a single-court system, because the two

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erence to a later infringement action, the patentee could always deprive the original declaratory plaintiff of its choice of forum and remedy. These considerations must have been powerful, because the Court approved not merely voluntary action by the second court, but injunctive process issued by the first court. Thus, the Court's dictum preferred some first-filed actions, in line with the approach found in *Hurd v. Moiles*.

31. "The bulk of authority supports the position that when a case is brought in one federal district court, and the case so brought embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the suitor in the more recently commenced case from taking any further action in the prosecution of that case. This necessarily follows from the basic proposition that the first court to obtain jurisdiction of the parties and of the issues should have priority over a second court to do so." National Equip. Rental Ltd. v. Fowler, 287 F.2d 43, 45 (2d Cir. 1961); 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2], at 3-40 to 3-45 (2d ed. 1980).

32. *See* Perez v. Ledesma, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting); *see also* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978). In *Pro Arts*, the court gave preference to a later-filed action, deprecating the prior declaratory action as a "race to the courthouse." *Id.* at 219. The preference for the later-filed action, however, was justified principally on the grounds that the plaintiff in the later action had filed earlier lawsuits against different parties involving the same rights. The court's disposition promised consistent dispositions of related lawsuits. *But see Kerotest*'s tolerant reference to the race. 342 U.S. at 185.

33. 28 U.S.C. § 1404 (1976); *see also* International Union of Elec., Radio & Mach. Workers v. NLRB, 610 F.2d 956 (D.C. Cir. 1979); United Steelworkers v. Marshall, 592 F.2d 693 (3d Cir. 1979), both applying 28 U.S.C. § 2112(a) (1976), which codifies a first-filed rule, but also seems to allow a change of venue on a more generous basis than that found in 28 U.S.C. § 1404 (1976). For a general discussion, see Hawarth, *Modest Proposals to Smooth the Track for the Race to the Court House*, 48 GEO. WASH. L. REV. 211 (1980).

court systems often exercise concurrent, independent jurisdiction,[34] and because review by the Supreme Court may not be available to coordinate duplicative efforts leading to conflicting judgments.[35]

In early decisions, the Court showed great concern that duplicative suits not proceed simultaneously to judgment.[36] This concern rested on fundamental principles of federalism and was not limited to cases involving the custody of specific property.[37] The Court vacillated with respect to its conception of duplicative proceedings;[38] once it found duplication, however, it favored the first-filed action, to which later actions were obliged to defer.[39] Thus, state courts received deference not because they were superior or better suited to the disposition of certain issues, but only when they began their task before the filing of a federal suit. Between courts of equal stature, only a neutral factor could resolve a conflict. The Court constantly stressed that the equality of the two court systems demanded that precedence must rest on priority of filing.[40] This equality of court systems was especially appropriate because both court systems decided mainly common-law issues for the first hundred years of the Republic. Federal courts, exercising mainly diversity jurisdiction, decided the same sorts of cases decided by state courts.[41]

34. "The rule is well recognized that the pendency of an action in state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different States and the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction on the same case." McClellan v. Carland, 217 U.S. 268, 282 (1910). For a discussion of *McClellan*, see note 72 & accompanying text *infra*.

35. See note 8 *supra*.

36. Smith v. M'Iver, 22 U.S. (9 Wheat.) 532 (1824); M'Kim v. Voorhies, 11 U.S. (7 Cranch.) 279 (1812); Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch.) 179 (1807).

37. Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867). "State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and State courts act separably and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases, between the State courts and this court, but there are no such relations between the State courts and the Circuit courts." *Id.* at 195-96.

38. *Compare* Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867) (similarity of core issues) *with* Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1865) (strict identity of parties and issues).

39. *E.g.*, Wallace v. M'Connell, 38 U.S. (13 Pet.) 136 (1839). For a discussion of *Wallace*, see text accompanying notes 52-53 *infra*.

40. *See, e.g.*, text accompanying note 55 *infra*.

41. General federal question jurisdiction, now embodied in 28 U.S.C. § 1331, was conferred in 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470. Before that date, the general grants of

Although all may agree that duplication should be avoided, control of duplication raises special problems in a dual-court system. As federal and state court systems are equals, neither should attempt to impose on the other. One might surmise, therefore, that abatement and the stay order were the preferred methods of controlling duplication and that the injunction was disfavored. Moreover, a federal statute commonly known as the Anti-Injunction Act would seem to bar injunction of state court proceedings.[42]

The courts made use of abatement and the stay order.[43] They also refused to recognize the judgments of courts that had proceeded improperly with duplicative litigation.[44] Injunctions, however, were ultimately pressed into service by both state and federal courts to control duplicative litigation in the other court system.[45] The significant qualification to the use of the injunction was that it could issue only from the court of first filing. Thus, the Anti-Injunction Act was not a broad prohibition on the use of the injunction, but a reservation of that power to the court attempting to control reactive litigation.

Early Supreme Court decisions established that coordinate courts generally should not enjoin one another.[46] A New York decision later

jurisdiction were over diversity and admiralty claims. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

42. 1 Stat. 335 (1793) (current version codified at 28 U.S.C. § 2283 (1976)). The original Act provided in material part: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." Section 2283 now reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Anti-Injunction statute has inspired much commentary, most of which laments the statute's obscure origins and the debatable interpretation of the statute by the Court. *See* Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 DICK. L. REV. 369 (1970); Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932); Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978); Reaves & Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294 (1971); Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930); Comment, *Federal Court Stays of State Court Proceedings: A Reexamination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1979); Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961); Comment, *The Anti-Injunction Statute: A Damoclean Sword Blunted, Sharpened, Broken, and. . . .!*, 22 J. PUB. L. 407 (1973).

43. See notes 9-33 & accompanying text *supra*.

44. See notes 52-55 & accompanying text *infra*.

45. See notes 62-65 & accompanying text *infra*.

46. M'Kim v. Voorhies, 11 U.S. (7 Cranch) 279 (1812); Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807).

In *Diggs & Keith*, the plaintiffs had sued on two promissory notes in state court. The

agreed, principally because an injunction may lead to a counter-injunction, which would paralyze the courts from rendering any decision in the dispute.[47]

In *Renner & Bussard v. Marshall*,[48] an 1816 case, plaintiff Marshall sued in federal court on a bill of exchange. He then brought a second action in state court on the same bill against the same defendant and joined additional defendants. The common defendant moved for abatement of the earlier-filed federal court action, which would have allowed the second case to continue. The second case, in which all the parties were brought together, offered the prospect of more complete relief. The federal court refused to abate. Upholding this refusal, the Supreme Court stated that while the state court action might have been abated, it would have been improper to abate the federal action.[49]

The Court's suggestion that the state court should abate is dictum. Nonetheless, it is noteworthy for two reasons. First, the two suits were not identical because additional parties were present in the state court action.[50] Second, there was some authority, even in 1816, for the proposition that a prior foreign action might not abate a second action.[51] Arguably, the federal court was "foreign" because it was not part of a state court system. *Renner & Bussard*, then, tacitly approved priority for an *in personam* action that is not identical to a later-filed action.

In *Wallace v. McConnell*,[52] the Court expanded *Renner & Bussard* by denying effect to state court proceedings governing property in the control of the state court. The plaintiff sued on a note in federal court.

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defendant, Wolcott, then became a plaintiff and prayed for equitable relief in the state's separate chancery court. Diggs & Keith removed the equitable action to federal court, which proceeded to grant the equitable relief sought by Wolcott. On review, the Supreme Court simply stated that "a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court" and reversed. 8 U.S. (4 Cranch) at 179.

Equally uninformative is the *M'Kim* case. M'Kim obtained a federal writ of ejectment against Voorhies. Voorhies, asserting an equitable lien on the property in question, then obtained a state injunction against enforcement of the federal judgment. When the federal court refused to issue a writ of enforcement in the face of the state injunction, M'Kim appealed to the Supreme Court, which ordered the lower court to issue the writ, stating simply that "the state court had no jurisdiction to enjoin a judgment of the circuit court of the United States." 11 U.S. (7 Cranch) at 280.

47. Mead v. Merritt, 2 Paige Ch. 402 (N.Y. Ch. 1831).

48. 14 U.S. (1 Wheat.) 215 (1816).

49. Justice Story, the author of the opinion, stated in a later case that the parties must be identical in order to grant abatement. In addition, no abatement is possible when the other suit is pending in state court. Wadleigh v. Veazie, 28 F. Cas. 1319 (C.C.D. Me. 1838) (No. 17,031).

50. See text accompanying note 10 *supra*.

51. *See* Maule v. Murray, 7 Term R. 470, 101 Eng. Rep. 1081 (1798).

52. 38 U.S. (13 Pet.) 135 (1839).

Third parties, claiming as creditors of the federal plaintiff and giving him notice, then proceeded in state court to attach the debt owed by the defendant to the plaintiff. The federal defendant admitted his debt on the note, paid the attaching creditors, and sought credit against any judgment to be rendered in the federal court. Although the federal trial court merely had "possession" of a lawsuit, and not of specific property, it denied credit for the payment to the third parties. The Supreme Court approved this disposition, stating:

> The plea shows, that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. . . . [W]here the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim *qui prior est tempore, porior est jure*, must govern the case.[53]

The Court was protecting jurisdiction of a prior-filed lawsuit, not specific property in its control, for the state court had first assumed control of the "property." Rather than resort to an injunction, the Court merely denied effect to the state court proceedings, implying that the federal courts had exclusive jurisdiction over all proceedings relating to the note. *Wallace* thus enforced the deference to prior federal proceedings suggested in *Renner & Bussard*.

In *Peck v. Jenness*,[54] decided in 1849, the Court again refused to recognize the effect of a judgment in a later-filed action, theorizing that the first court obtained exclusive jurisdiction upon filing. The Court decided that a discharge in bankruptcy did not avoid a lien created by a prejudgment attachment that was filed before the federal bankruptcy proceedings began. In affirming the state supreme court, the Court explained the paramount status of the earlier state proceedings:

> [The state court] was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal. The District Court had no supervisory authority over it. . . .
>
> It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and . . . its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prose-

53. *Id.* at 150.
54. 48 U.S. (7 How.) 611 (1849).

> cute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other.[55]

The Court did not negate all use of the injunction, but suggested that the court whose process is later involved may not proceed by injunction or otherwise. Recognizing jurisdiction in both courts could lead to conflicting judgments, including injunctions.[56]

In succeeding cases, the court continued to assert priority for the first-filed action, but erratically required strict identity of parties and cause of action. Thus, in 1865, in *Buck v. Colbath*,[57] goods of an alleged debtor were attached by a federal marshal in a prejudgment seizure. The debtor brought suit against the marshal in state court for trespass. On review of a state judgment in favor of the debtor, the Court denied the appropriateness of abating the state action. The debtor had not sought replevin of the goods.[58] Although the federal court must retain undisturbed custody, the debtor could seek an alternative remedy in state court.

> [I]t is not true that a court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.[59]

The Court did not discuss or distinguish earlier cases that required less than strict identity.[60] *Buck* signified no abrupt switch to a strict-identity test, for shortly afterwards the Court continued to find duplication

55. *Id.* at 624-25; *accord*, Chittenden v. Brewster, 69 U.S. (2 Wall.) 191 (1864); Hagan v. Lucas, 35 U.S. (10 Pet.) 400 (1836). Congress subsequently amended the Anti-Injunction Act to permit injunctions by the federal bankruptcy court. Act of Mar. 2, 1867, ch. 176, § 21, 14 Stat. (currently incorporated in 28 U.S.C. § 2283 (1976)).

56. An injunction from a court lacking subject matter jurisdiction would not bind the parties. *See Ex parte* Young, 209 U.S. 123 (1908). The parties might have difficulty, nonetheless, if they could not be sure which court had or lacked subject matter jurisdiction.

57. 70 U.S. (3 Wall.) 334 (1865). *Accord*, Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

58. Replevin would clearly fail under the doctrine of Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

59. 70 U.S. (3 Wall.) at 345.

60. *E.g.*, Renner & Bussard v. Marshall, 14 U.S. (1 Wheat.) 215 (1816). For a discussion of *Renner & Bussard*, see text accompanying notes 48-51 *supra*.

The Court gave as an example the treatment of litigation arising out of default on a note secured by a mortgage on real property. Suits for foreclosure of the mortgage, payment of the note, and ejectment from the property might each proceed in different courts because they raise separate causes of action. 70 U.S. (3 Wall.) at 345-46.

unacceptable in cases that shared core issues.[61]

By the 1870's, the Court not only disfavored duplication, but also added the injunction to its range of remedies. Contemporary cases enjoining state court suits after removal to federal court introduced the use of the injunction. In *French v. Hay*,[62] French obtained a judgment in a Virginia state court, and Hay removed the proceedings to federal court to attempt to set aside the judgment. French sued on the judgment in a Pennsylvania state court, and Hay obtained a federal injunction against the proceedings to enforce the judgment. The Supreme Court upheld the injunction and rejected the argument that the Anti-Injunction Act[63] forbade relief. Federal jurisdiction embraced every question in the case; while it lasted, it was exclusive. As federal jurisdiction was exclusive, the Anti-Injunction Act had no application. These principles applied even in an *in personam* lawsuit. Moreover, the *French* Court did not treat the injunction as a special remedy for removed cases. Rather, removed cases merely illustrated the general rule that prior jurisdiction embraced "everything in the case . . . until it reached its termination and the jurisdiction was exhausted."[64] Prior jurisdiction amounted to exclusive jurisdiction, which could be protected by an injunction.[65]

Towards the end of the nineteenth century, federal courts employed the injunction to prevent state court litigation that would reliti-

61. *See* Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867).

62. 89 U.S. (22 Wall.) 250 (1874); *accord*, Dietzsch v. Huide-Koper, 103 U.S. 494 (1880).

63. 28 U.S.C. § 2283 (1976). See note 42 *supra*.

64. 89 U.S. (22 Wall.) at 253.

65. *Accord*, Reagan v. Dick, 76 Colo. 544, 233 P. 159 (1925); Shaw v. Frey, 69 N.J. Eq. 321, 59 A. 811 (V.C. 1905); Lyons v. Importers & Traders' Nat'l Bank, 214 Pa. 428, 63 A. 827 (1906); Akerly v. Vilas, 15 Wis. 440 (1862). *See* Baltimore & O.R.R. v. Kepner, 314 U.S. 44, 56 (1941) (Frankfurter, J., dissenting). It later became established, however, that a state court may never enjoin federal proceedings. Donovan v. City of Dallas, 377 U.S. 408 (1964). Even when the federal proceeding is brought in bad faith, a state court may not enjoin it. General Atomic Co. v. Felter, 434 U.S. 12 (1977). Pre-*Donovan* cases are examined in Arnold, *State Power to Enjoin Federal Court Proceedings*, 51 VA. L. REV. 59 (1965); Note, *State Injunctions Against Proceedings in the Federal Courts*, 90 U. PA. L. REV. 714 (1942).

The Court's citation of authorities indicates that the removed nature of the proceedings did not affect its disposition. The modern Court has continued to approve federal injunctions when a state court proposes to act in a removed case. *See, e.g.*, Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 640 (1977). The removal statute does not explicitly authorize a federal injunction. Instead, 28 U.S.C. § 1446(e) (1976) directs that state proceedings be stayed, a command that can be enforced by denying effect to the state court's judgment. Although Justice Frankfurter attempted to deny the removal injunction's history in Toucey v. New York Life Ins. Co., 314 U.S. 118, 133 (1941), the removal injunction is a vestige of the courts' general injunctive power to protect earlier acquired jurisdiction.

gate issues decided in federal court.[66] A state court suit that would relitigate an *in personam* action was enjoinable by a federal court, which could issue an injunction even if the later state suit alleged a different cause of action, as long as the federal judgment would preclude a judgment for the state plaintiff.[67]

Rickey Land & Cattle Co. v. Miller & Lux[68] illustrates a broad use of injunctive power to control duplicative litigation. Miller & Lux, owner of land in Nevada, brought suit in the Nevada federal court to assert various water rights in conflict with claimed rights of Rickey, an owner of land in California. Rickey then brought suit in a California state court against Miller & Lux as well as against additional parties.[69] In an opinion by Justice Holmes, the Supreme Court approved an injunction aganst the later-filed action, although the lawsuits were not identical. While neither suit involved custody of a res, the nature of the suits could have produced conflicting judgments.[70]

Thus, there has been a strong tradition against duplicative litigation, although the meaning of "duplicative" was not consistently resolved. Contrary to the suggestions in later cases, this disfavor was not confined to lawsuits involving *in rem* rights.[71] Indeed, duplication was freely permitted only in the special context of probate proceedings.[72]

66. *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 137-39 (1941), and the dissent of Justice Reed, *id.* at 141-54.

67. *See* Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906) (dictum).

68. 218 U.S. 258 (1910). For a discussion of this case, see the excellent faculty Note by Professor Schofield, 5 ILL. L. REV. 508 (1911).

69. The addition of parties was probably made to defeat removal to federal court. The same strategy was pursued in Kline v. Burke Construction Co., 260 U.S. 226 (1922). See notes 73-82 & accompanying text *infra*.

70. *Accord*, Looney v. Eastern Texas R.R., 247 U.S. 214 (1918). In *Looney*, railroads filed federal suit against state-imposed rates. When the state attorney general resorted to state court to enforce rates, the federal court enjoined prosecution in state court. "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice." *Id.* at 221.

71. *But see* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977): "We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court . . . ."

72. In probate administration, the Court has tolerated duplicative litigation. In *McClellan v. Carland*, 217 U.S. 268 (1910), the plaintiffs instituted a federal suit to declare their rights in an estate that was the subject of probate proceedings in a state court. The lower federal court had stayed its proceedings to allow the state attorney general to file suit for escheat. In disapproving the stay, the Court declared: "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." *Id.* at 282. *McClellan* did not approve duplicative litigation in all contexts. The Court held that federal chancery jurisdiction in di-

Kline v. Burke Construction Co.

In 1922, however, the Court made a major statement in favor of duplication in *Kline v. Burke Construction Co.*[73] In *Kline*, a construction company brought an action in federal court against a city for payment on a paving contract. The city, in turn, filed a suit in state court against the construction company and its sureties on a performance bond. After an unsuccessful attempt to remove the city's suit to federal court, the construction company sought an injunction from the federal district court against further prosecution of the state action. The district court's denial of the injunction was reversed by the Eighth Circuit. The Supreme Court, in construing the Anti-Injunction Act's prohibition of a federal court's issuing an injunction to stay state court proceedings, noted the exception provided by section 262 of the Judicial Code, which authorized a federal court to issue all writs necessary for the exercise of its jurisdiction.[74]

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessar-

versity cases was not impaired by subsequent state legislation creating probate courts. *Id.* at 281.

As the federal courts have had a long tradition of disclaiming the jurisdiction to probate wills, *see* Markham v. Allen, 326 U.S. 490 (1946) (dictum), it would seem logical that they would deny jurisdiction over all suits collateral to probate administration. As property rights are involved in these cases, avoidance of duplicative proceedings would be an understandable goal. Because of the federal disclaimer, however, not even a diligent party could obtain federal jurisdiction were the Court to enforce a first-filed rule in the context of probate administration. By 1909, in Waterman v. Canal Louisiana Bank Co., 215 U.S. 33 (1909), the Court had determined that a federal court could entertain a suit for declaration of property rights, although state probate proceedings had already begun. While the federal judgment would be personally binding on the estate's representative, the federal court could not enforce an accounting or directly interfere with the state court's possession of the assets. That a federal court could render a binding judgment in the face of prior proceedings is contrary to the Court's statements in *Wallace v. McConnell*, see text accompanying notes 52-53 *supra*, and *Peck v. Jenness*, see text accompanying notes 54-55 *supra*. In *Wallace* and *Peck*, however, either party could exercise diligence in seeking the forum of his or her choice. The exception created in *Waterman* resulted from the federal courts' inability to probate wills. Cases prior to *Waterman* include: Green's Adm'x v. Creighton, 64 U.S. (23 How.) 90 (1859); Union Bank of Tennessee v. Jolly's Adm'rs, 59 U.S. (18 How.) 503 (1855); Williams v. Benedict, 49 U.S. (8 How.) 107 (1850); Erwin v. Lowry, 48 U.S. (7 How.) 172 (1849); Suydam v. Broadnax, 39 U.S. (14 Pet.) 67 (1840).

73. 260 U.S. 226 (1922).

74. *Id.* at 229. Section 262 of the Judicial Code is now incorporated in the current anti-injunction statute, 28 U.S.C. § 2283 (1976). See note 42 *supra*.

ily impairs, and may defeat, the jurisdiction of the federal court already attached.[75]

However, apart from the exception governing *in rem* jurisdiction,[76] the Court determined that duplicative lawsuits in state and federal court may proceed without reference to one another. This doctrine as stated in *Kline* has been uncritically accepted on many occasions,[77] and courts continue to cite it approvingly.[78] *Kline*, however, misrepresented prior practice,[79] and has been ignored so frequently[80] that it retains little authority. *Kline* can be interpreted narrowly to forbid the use of an injunction to control duplicative litigation, but not to forbid the use of a voluntary stay in the same situation. The continuing importance of *Kline* is its rejection of the injunction to control duplicative litigation.[81]

Prior to *Kline*, a party had no obligation to resort to the state courts rather than invoke concurrent federal jurisdiction. By entering federal court, a party foreclosed the possibility of obtaining state court jurisdiction. The *Kline* Court's willingness to allow duplicative proceedings to continue made possible the development of the abstention doctrine.[82] In *Railroad Commission of Texas v. Pullman*,[83] which laid the foundation of the abstention doctrine, the Court ordered the parties to invoke state court jurisdiction for a resolution of state law issues. The Court desired to avoid a decision based on constitutional issues,[84]

75. 260 U.S. at 229.

76. Recognizing that a court might protect its jurisdiction over a res, the Court declared: "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. . . . The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." 260 U.S. at 230.

77. Princess Lida v. Thompson, 305 U.S. 456 (1939).

78. *See, e.g.*, Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion, Rehnquist, J.).

79. See text accompanying notes 46-71 *infra*.

80. See note 93 & acompanying text *infra*.

81. *See* Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978). *But see* Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973) (Stevens, J.).

82. For a complete discussion of the abstention doctrine, see Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

83. 312 U.S. 496 (1941).

84. *Id.* at 498. For a general statement of the Court's reluctance to decide constitutional issues unnecessarily, see Ashwander v. Tenn. Valley Authority, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

but preferred not to resolve the state law issues that would have permitted this avoidance. Absent abandonment of its pre-*Kline* cases, the Court could not have made such a request of a federal plaintiff, for the prior jurisdiction of the federal court would have precluded later interference by a state court.[85] *Pullman*, however, departed from *Kline* in one significant aspect. Rather than racing to judgment, which *Kline* had urged, the federal court awaited state court resolution, which would not bind the parties if the plaintiff desired to return to federal court.[86]

Another, more extensive abstention doctrine was created in *Burford v. Sun Oil Co.*,[87] which illustrates the continuing disfavor in which duplicative proceedings are held. In this variation of *Pullman*, the federal plaintiff was required to abandon its federal suit and initiate state court proceedings that would bind the parties on all issues.

In *Burford*, Sun Oil filed a federal suit to enjoin an order of the Texas Railroad Commission that permitted the plaintiff's neighbor, Burford, to drill oil wells. Sun Oil believed that the neighbor's drilling would interfere with its own efforts to extract oil. Under state law, review of this type of order was available in a single court that had statewide jurisdiction. The Court dismissed and declared inappropriate any federal review of the merits of the case.

It is unclear why *Burford* required state court adjudication. Possibly the state court, because it had exclusive jurisdiction over this type of order, had developed special expertise in deciding a class of cases that, although capable of being stated in constitutional terms, raised narrow, technical, factual issues.[88] The *Burford* Court thus eschewed the duplication of *Pullman* and inexplicably awarded priority to a state action yet to be filed.

The Court also disapproved of duplicative adjudication in *Brillhart v. Excess Insurance Co.*[89] A garnishment action had been brought in state court against a liability insurer. The insurer's reinsurer instituted

85. *See, e.g.*, Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867).

86. In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court, relying on the Congressional grant of concurrent jurisdiction in civil rights cases in 28 U.S.C. § 1983, ruled that state court resolution of federal law issues did not bind the parties if they chose not to be so bound by specifically reserving the issues, thus preserving their right to trial court determination of facts relevant to federal law issues.

87. 319 U.S. 315 (1943). For an example of the application of "*Burford* abstention," see Alabama Public Service Comm'n v. Southern R.R., 341 U.S. 341 (1951).

88. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1156-57 (1974).

89. 316 U.S. 491 (1942).

a federal action for a declaratory judgment that it was not accountable even if the insurer or the insured should be liable. The judgment-creditor then joined the reinsurer as a defendant in the garnishment action. The lower court dismissed the declaratory action, and the court of appeals reversed, directing that the trial proceed.

The Supreme Court reversed and remanded so that the district court could determine whether the state garnishment proceedings would allow the federal plaintiff to assert as defenses the issues raised in the declaratory action. If so, the district court had rightly dismissed.

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.[90]

Brillhart can be interpreted as a narrow exception to *Kline*,[91] an exception that rests on the declaratory nature of the federal remedy sought. The Court's disposition, however, suggests generally that a federal court should defer to a more comprehensive state action.[92]

The courts of appeals have been unwilling to grant *Kline* a broad scope and to undertake duplicative litigation. In many cases, they have stayed in deference to previously-filed state proceedings.[93] The Court

90. *Id.* at 495.

91. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667 (1978) (Blackmun, J., concurring) (suggesting that the Court may have retreated from the broad language of *Brillhart*).

92. In this regard, *Brillhart* previewed Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952), in which the duplicative proceedings were lodged in two federal courts. For a discussion of *Kerotest*, see text accompanying notes 23-30 *supra*.

93. *See* Ashman, Alfini & Shapiro, *Federal Abstention: New Perspective on Its Current Vitality*, 46 MISS. L.J. 629 (1975); Comment, *The Viability of Stays of Federal Actions Pending the Outcome of Parallel State Litigation*, 54 CHI.-KENT L. REV. 614 (1977); Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977); Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684 (1960); Note, *Power to Decline the Exercise of Federal Jurisdiction*, 37 MINN. L. REV. 46 (1952); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978 (1950).

In *P. Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951), suit was filed in a Connecticut court for a declaration of rights in trademarks. The defendant in the first suit then instituted a federal action for trademark infringement, seeking an accounting. The Second Circuit approved a stay of the federal action. Under *Kline*, this case came to the wrong result. If *Brillhart* suggests that the more comprehensive action should continue, the *Beiersdorf* result is also wrong because the federal suit would be more comprehensive than the state suit. Deference, however, was given to the first-filed action, which had triggered a reactive suit whose principal issues were identical. Thus, *Beiersdorf* substantially continued the pre-*Kline* tradition and parallels *Kerotest's* prescription for the disposition of duplicative federal suits. See text accompanying notes 23-31 *supra*. Other circuits have taken the same

recently has reemphasized the avoidance of duplicative litigation, thus suggesting that it has abandoned much of the *Kline* rule.[94]

In *Colorado River Water Conservation District v. United States*,[95] the federal government, asserting water rights in certain rivers, brought suit against one thousand defendants. The state of Colorado had established a system of specialized water rights courts, which sit continuously to establish priorities in water use and to integrate those claims with rights previously established.[96] When one of the defendants in the federal suit later made the United States a party to the state proceedings, the government was offered a full opportunity to present the same claims made in the prior federal suit. The lower federal court dismissed on abstention grounds; the court of appeals reversed and remanded.[97]

The Supreme Court approved the dismissal on grounds other than abstention.[98] Noting that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule,"[99] the Court categorized its various abstention doctrines—*Pullman*,[100] *Burford*,[101] and *Younger*[102]—and declared abstention inappropriate on all three bases.[103] The dis-

approach, hesitating to stay only when the case is within exclusive federal jurisdiction. *See* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537 (3d Cir. 1975); Lecor, Inc. v. United States District Court, 502 F.2d 104 (9th Cir. 1974).

94. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

95. 424 U.S. 800 (1976).

96. Each river may be considered a res that is administered by one of the water rights courts. The Court did not, however, base its deference upon a strict rule of prior jurisdiction over the res. *See id.* at 818-20.

97. 424 U.S. at 806.

98. The Court gave no justification for its approval of a dismissal, when a stay, the procedural device typically employed, *see, e.g.*, P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951), *discussed in* note 93 *supra*, would have provided more flexibility. If the state court should unnecessarily delay its decision, a federal court that has stayed may proceed to judgment, while a court that has dismissed the action may not.

99. 424 U.S. at 813.

100. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (federal constitutional issue might be mooted by a state court determination of state law).

101. Burford v. Sun Oil Co., 319 U.S. 315 (1943) (exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern).

102. Younger v. Harris, 401 U.S. 37 (1971) (federal jurisdiction involved for the purpose of restraining a state criminal proceeding not tainted by bad faith, harrassment, or a patently invalid state statute). The Court also placed in the *Younger* category attempts to restrain state nuisance proceedings antecedent to a criminal prosecution that are directed at obtaining the closure of places exhibiting obscene films, 424 U.S. at 816 (citing Huffman v. Pursue, 420 U.S. 592 (1972)), and attempts to restrain collection of state taxes, 424 U.S. at 816 (citing Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)).

103. The inappropriateness of *Burford* abstention is especially puzzling. See text accom-

missal was proper because state and federal proceedings were duplicative. Although the federal courts have an "unflagging obligation" to exercise their jurisdiction,[104] even when parallel state proceedings are pending, "exceptional" circumstances may require deference.[105] The Court considered three factors: (1) the inconvenience of the federal forum; (2) the desirability of avoiding piecemeal litigation; and (3) the order in which jurisdiction was obtained by the concurrent forums.[106] The Court appeared oblivious, however, to the frequent tension between the second and third factors. A later-filed suit may determine a variety of related issues more comprehensively and efficiently, but may also represent the second plaintiff's ingenuity in expanding basic issues already presented to another court by a more diligent opponent.

The Court approved deference to the Colorado state proceedings because it discerned a congressional policy against piecemeal adjudication of water rights in a river system[107] and because, while separate proceedings might create conflicting or inconsistent dispositions of property interests, the pending Colorado proceedings supplied an integrated resolution of federal claims with state-created rights.[108] Thus, under this rationale, the Court could justify dismissal of a federal suit brought by the federal government to adjudicate federal water rights.[109] When an "exceptional" circumstances test excludes from federal court a party that has the most extensive potential water rights claims, the test is suspect.

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panying notes 87-88 *supra*. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 199 (2d ed. 1970). Professor Wright has characterized "*Burford* abstention" as a doctrine that requires a federal court to "refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs." *Id.* In light of the comprehensive system established in Colorado for the determination of appropriate water rights, described in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 804-05, and the Court's focus on the McCarran Amendment (codified at 43 U.S.C. § 666), which provides that consent is given to join the United States as a defendant in any suit for the adjudication or administration of water rights when it appears that the United States is a defendant, the appropriateness of a *Burford*-type abstention would seem well-established.

104. 424 U.S. at 817.

105. *Id.* at 818. Exceptional circumstances are those that permit "the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration." *Id.* The *Colorado River* Court noted the "res" exception, which for reasons of comity effectively gives exclusive jurisdiction to a court first assuming jurisdiction over property. *Id.*

106. *Id.* at 819-20.

107. *Id.* at 819.

108. The dissenters persuasively argued that federal adjudication need not be inconsistent with state court adjudication. Federal priorities, based on federal law, could easily be integrated with existing state-determined rights. *Id.* at 823-25 (Stewart, J., dissenting).

109. The other factors upon which the Court relied, *id.* at 820, seem insubstantial.

Will v. Calvert Fire Insurance Co.[110] presented a more common situation, but did not resolve the tension implicit in *Colorado River*'s two factors. Suit was commenced in state court for a declaration concerning contractual obligations arising out of a reinsurance agreement. The defendant in the state court action raised an equitable defense that the contract violated the federal securities laws, the securities laws of two states, and common-law fraud doctrines. Relying on these defenses, the defendant requested equitable rescission. It also asserted a counter claim for damages based on these theories. It did not, however, rely on the Securities Exchange Act of 1934, because federal courts have exclusive jurisdiction over claims under the 1934 Act.[111]

The defendant simultaneously became a plaintiff in a federal action for damages predicated on identical theories of relief. The lower federal court stayed action on all branches of the federal complaint, except the Securities Exchange Act claim for damages. The court of appeals granted mandamus to the federal court plaintiff, relying on the "exceptional circumstances" language in *Colorado River*,[112] and the Supreme Court reversed. In reviewing the grant of mandamus, the plurality opinion of four justices emphasized the stringent standard of review in a mandamus case. The petitioner must demonstrate a "clear and indisputable" right to mandamus, thus showing that the district court patently failed in its duty when it stayed in deference to state court proceedings.[113] Moreover, the plurality stressed that the district court had stayed, and not dismissed, the action.[114]

The plurality next noted that a pending state court action does not

110. 437 U.S. 655 (1978), *discussed in* Note, *Abstention and Mandamus After Will v. Calvert Fire Insurance Co.*, 64 CORNELL L. R. 566 (1979).

111. 15 U.S.C. § 78aa (1976).

112. 560 F.2d 792, 793. In doing so, the Seventh Circuit overruled its previous decision in Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970). *Altheimer* had rejected *Kline* and had followed P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951). 560 F.2d at 796.

113. 437 U.S. at 662.

114. *Id.* at 665. The plurality acknowledged the possibility that a stay might be inappropriate as against the Securities Exchange Act claim, but it did not embrace this proposition, as had some courts of appeals. The plurality justified upholding the stay on the other causes of action by stating that it would be pointless to reverse a stay order when the judge could delay a case without using a stay order and thus escape review by a higher court. On remand, proceedings revealed that the district court had considered the 1934 Act damages claim to be stayed. It treated the federal action as vexatious because the federal plaintiff could have invoked federal jurisdiction and avoided duplication if it had removed the original action from the state court. Calvert Fire Ins. Co. v. Am. Mut. Reinsurance Co., 600 F.2d 1228 (7th Cir. 1979). The plaintiff's concession that it could prove no damages under the Securities Exchange Act only strengthened the district court's assessment and its resolve on

bar a federal court action from proceeding. A federal court, on the other hand, is under no compulsion to decide a parallel action.[115] The decision to stay is left largely to the discretion of the federal district court. Although it invoked *Colorado River*, the plurality shifted from an exceptional circumstances test to an abuse of discretion test.[116] Suggesting that the proliferation of litigation has led to more duplicative litigation than in previous times, the plurality noted that the older view that litigation may normally proceed simultaneously in two court systems gives inadequate attention to the burdensome, wasteful results of duplicative litigation.[117]

Thus, although *Kline* has not been explicitly discarded, its principle has been repudiated. *Colorado River* and *Will* revived the policy that federal courts should avoid duplicative litigation. In a case like *Will*, therefore, a federal court should stay reactive federal litigation. Similarly, the federal court should proceed when later-filed state suits are essentially reactive. Although this prescription creates a risk of duplication not possible prior to *Kline*, state courts will probably defer in these instances without the compulsion of an injunction,[118] as they have done when overlapping litigation has been filed in other states.[119] In avoiding duplicative litigation, federal courts should not always prefer state court resolution of an issue, for this would erode, if not abolish, congressionally-conferred jurisdiction.

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remand not to expend effort on a case whose only purpose was to delay a judgment in the state court. The Seventh Circuit affirmed the decision on remand.

Judicial administration should avoid vexatious litigation. As noted earlier, the courts of appeals have been reluctant to process reactive litigation when a state suit promised speedy resolution of the basic dispute between the parties. *See* Rice v. Rice Foundation, 610 F.2d 471 (9th Cir. 1979); Genichlor Int'l Inc. v. Multisonics Dev. Corp., 580 F.2d 981 (9th Cir. 1978). See notes 93-94 & accompanying text *supra*. *Will*, on remand, fits this pattern.

115. 437 U.S. at 662-63 (citing Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)). For a discussion of *Brillhart*, see notes 89-91 & accompanying text *supra*.

116. "Although most of our decisions . . . have concerned conflicts of jurisdiction between two federal district courts, e.g., Kerotest . . . we have recognized the relevance of those cases in the analogous circumstances presented here . . . . In both situations, the decision is largely committed to the carefully considered judgment . . . of the district court." 437 U.S. at 663. This formula was approved in Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952). For a discussion of *Kerotest*, see text accompanying notes 23-31 *supra*. Justice Blackmun, concurring, disapproved of the *Kerotest* standard and would have applied the exceptional circumstances test of *Colorado River*. 437 U.S. at 667-68 (Blackmun, J., concurring).

117. 437 U.S. at 663; *see also* In re Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981).

118. *See* Tambone v. Simpson, 91 Ill. App. 3d 865, 414 N.E.2d 533 (1980).

119. *See, e.g.*, Simmons v. Superior Court, 96 Cal. App. 2d 119, 214 P.2d 844 (1950); cases collected in Annot., 19 A.L.R. 2d 301 (1951).

Inequitable Litigation

The preceding discussion has focussed on the disfavor in which duplicative proceedings are held. Infrequently, a single lawsuit may threaten to impose inequity in this context.[120] In a unitary court system, the appellate process corrects error and is thought to protect the judicial process from abuse. Thus, coordinate courts within the same system do not intervene to remedy the inequity of a prior pending lawsuit.[121] Relying on the appellate process and disfavoring interference by a coordinate court is justifiable because the availability of review by a coordinate court may allow duplicative litigation, which itself carries the threat of inequity.

When courts of separate sovereigns are implicated, the power of a coordinate court to correct perceived abuses has been less restrained.[122] The policy arguments against such interferences are as strong as they are in a unitary court system. Abandonment of the appellate process carries with it the risk of duplication and its attendant evils. If one sovereign grants an injunction against litigation pending in another sovereign's jurisdiction, the former arrogates a task that the latter is able to perform through the normal operation of its appellate process. Notwithstanding the strong theoretical arguments against such intervention, courts traditionally have intervened to correct inequitable litigation in a separate court system.

State Court Injunctions of Proceedings in Other States

Many cases have arisen in the context of a state court enjoining proceedings in another state court.[123] Courts have been prompted by three major purposes: (1) to prevent a choice of law deemed improper by the issuing court; (2) to nullify fraudulently obtained judgments; and (3) to control choices of an inconvenient forum.[124]

120. *See* Bomeisler v. Forster, 154 N.Y. 229, 48 N.E. 534 (1897), in which the court restrained a woman from suing to establish rights based upon a man's alleged promise to marry her and upon his alleged paternity of her children. Because the man had made a prior settlement wih her in return for a complete release, the court reasoned that a full trial on the underlying allegations would deprive him of the benefit of the settlement even if he prevailed on those issues.

121. *See* Smith v. M'Iver, 22 U.S. (9 Wheat.) 532 (1824). *But see* Bomeisler v. Forster, 154 N.Y. 229, 48 N.E. 534 (1897) *discussed in* note 120 *supra*.

122. *See* Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N.E. 380 (1885); New Orleans & Northeastern R.R. v. Bernich, 178 La. 153, 150 So. 860 (1933); Sharp v. Learned, 185 Miss. 872, 188 So. 302 (1939); Lord Portarlington v. Soulby, 40 Eng. Rep. 40 (1834).

123. *See* Note, *When Courts of Equity will Enjoin Foreign Suits*, 27 IOWA L. REV. 76 (1941).

124. *See* Kempson v. Kempson, 58 N.J. Eq. 94, 43 A. 97 (1899).

In the first group of cases, courts have enjoined pending litigation when it was obvious that a party has filed its suit in another forum to obtain a choice of law more favorable to its interest.[125] The enjoining court forbids a choice of law that is seemingly neither unconstitutional nor contrary to generally shared standards of choice of law. The only significant limitation on this doctrine is the requirement that an "incorrect" choice of law be reasonably certain to occur absent coercive relief.[126]

In *Cole v. Cunningham*,[127] the Supreme Court reviewed a judgment of the Massachusetts Supreme Judicial Court. A Massachusetts creditor, upon learning that his Massachusetts debtor might seek relief under the state insolvency laws, assigned his debt to a New York resident without consideration. The assignee immediately garnished a New York debt owed to the Massachusetts debtor. Under New York law, the attachment would have priority over any claims of a Massachusetts assignee in insolvency, the common representative of all the creditors in a Massachusetts insolvency proceeding. After institution of the New York garnishment proceeding, the Massachusetts debtor initiated Massachusetts insolvency proceedings. The other Massachusetts creditors, concerned that the New York assignee would obtain a priority unavailable to his Massachusetts assignor under Massachusetts law, obtained an injunction from the Massachusetts state court forbidding assignor and assignee from continuing the New York proceedings.

The Supreme Court affirmed the grant of an injunction, stating that the injunction affected the parties, not the New York court.[128] The Court's refusal to grant deference to these earlier proceedings is noteworthy because the New York proceedings were brought under *quasi in rem* jurisdiction.[129] Relying on decisions granting relief in similar circumstances,[130] the Court characterized the conduct of the Massachusetts assignor and the New York assignee as fraudulent and inequitable. Both the Massachusetts assignor and the New York as-

125. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N.J. Eq. 457, 71 A. 153, 163-65 (1908) (injunction against proceedings in Massachusetts denied because court found that the defendant had not purposely attempted to avoid New Jersey law).

126. *See* Delaware, L. & W. R.R. v. Ashelman, 300 Pa. 291, 150 A. 475 (1930) (injunction not granted because there was no fundamental difference of policy between the chosen forum and the jurisdiction in which the action arose). A plaintiff seeking an injunction must show that the defendant brought suit in a foreign jurisdiction to evade the laws of the logical forum and that the laws of the foreign jurisdiction are oppressively different. *Id.* at 296-98.

127. 133 U.S. 107 (1890).

128. *Id.* at 121.

129. *See, e.g.*, Peck v. Jenness, 48 U.S. (7 How.) 611 (1849).

130. *E.g.*, Dehon v. Foster, 86 Mass. (4 Allen) 545 (1862).

signee sought positions that Massachusetts law would forbid. New York law, on the other hand, would clearly permit this advantage. Moreover, had the New York courts proceeded to judgment without interference, the Supreme Court would have found no constitutional defect.[131] The "procedural" characterization of the preference derived from attachment stressed the choice of forum.[132] As the New York court took jurisdiction first, its proceedings should have received deference.[133]

Cole clearly permits one sovereign to find that another sovereign's choice of law is incorrect, even when that choice would not be unconstitutional. *Cole* substitutes collateral review for appellate review and creates the potential for conflicting injunctions, neither of which may be entitled to full faith and credit.[134]

The second class of injunctions[135] against enforcement of fraudulently-obtained foreign judgments, is less controversial than are injunctions based on a forum's probable choice of law. If a foreign judgment is procured through fraud, a local court need not enforce it under the full faith and credit clause of the Constitution.[136] A local court may give more complete relief by affirmatively enjoining its enforcement,

131. *See* Green v. Van Buskirk, 74 U.S. (7 Wall.) 139 (1868).

132. *See* RESTATEMENT OF CONFLICT OF LAWS § 590 (1934).

133. Judicial willingness to prevent an "incorrect" choice of law is also illustrated in Dinsmore v. Neresheimer, 39 N.Y. Sup. Ct. 204 (1884). The equity plaintiff, an express company, had accepted from the equity defendant two packages for shipment. The contract may have been made in New York; in any event, delivery was to have been made in Chicago and in Philadelphia. New York law would uphold a limitation-of-liability clause in the contract of affreightment. The equity defendant had agreed to such a provision and could have secured insurance for his parcels at a higher value had he been willing to pay an extra charge. When a claim for loss arose, the shipper brought suit in the District of Columbia. The carrier countersued in New York for an injunction against the District of Columbia suit, arguing that the District of Columbia's probable choice of law made the equity defendant's resort to the original forum unconscionable and fraudulent. The New York Court granted relief, agreeing that the equity defendant acted fraudulently and unconscionably. In 1879, however, the District of Columbia, relying on an 1873 Supreme Court decision, New York Cent. R.R. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873), had invalidated limitation-of-liability clauses as violative of public policy. Gault v. Adams Express Co., 11 D.C. (MacArth. & M.) 124 (1879). Thus, the equity defendant was charged by the New York court with fraudulent, unconscionable conduct for trying to avoid a clause that had been held to violate public policy.

134. The questionable basis of these injunctions is reflected in the frequent refusal of an enjoined court to recognize an injunction against further proceedings. *See* James v. Grand Trunk West R.R., 14 Ill. 2d 356, 152 N.E.2d 858 (1958); Union Pac. R.R. v. Rule, 155 Minn. 302, 193 N.W. 161 (1923).

135. *See* RESTATEMENT OF JUDGMENTS §§ 117-30 (1942).

136. U.S. CONST. art. 4, § 1. As such a judgment can be attacked in the state of its rendition, it can receive no greater respect in another forum. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 93, Comment b (1971).

thus denying the judgment effect in every jurisdiction, including the state of its rendition.[137] By this step, however, the enjoining court impinges upon the independence of the rendering court, which has full authority to reopen the judgment on a suggestion of fraud and to give relief to the judgment debtor.

In a third class of cases, courts have granted injunctions because the suit pending elsewhere against the equity plaintiff would cause great inconvenience.[138] As the allegedly inconvenient forum could grant a dismissal based on a plea of forum non conveniens, an injunction preempts consideration by an equal sovereign and clashes with the spirit of comity. Nonetheless, a number of state courts have granted injunctions.[139]

137. *See* Dobson v. Pearce, 12 N.Y. 156 (1854); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 113 (1971).

138. *E.g.*, Guldman v. Wilder, 45 Colo. 551, 101 P. 759 (1909); Mason v. Harlow, 84 Kan. 277, 114 P. 218 (1911).

139. *E.g.*, Kern v. Cleveland, C., C. & St. L. Ry., 204 Ind. 595, 185 N.E. 446 (1933); Reed's Adm'r'x v. Illinois Cent. R.R., 182 Ky. 455, 206 S.W. 794 (1918).

In Miles v. Illinois Central Railroad, 315 U.S 698 (1942), the Supreme Court reviewed a Tennessee state injunction against an action pending in a Missouri state court and disapproved this practice. The Court seemed to reason that if Congress gave a broad choice of venue, an injured railway worker could not be faulted for employing it. At the same time, however, the Court, in dictum, suggested that Missouri might dismiss the case on a plea of forum non conveniens, unless doing so would discriminate against the out-of-state citizen. *Id.* at 704. This dictum suggests that a chosen forum may close for inconvenience, but that an injunction by another court is not the proper remedy.

Miles appears to discountenance the injunction only in FELA cases. Control of forum selection by injunction continues, especially in divorce actions. In these cases, considerations of interstate comity are discounted. In Kempson v. Kempson, 58 N.J. Eq. 94, 43 A. 97 (1899), a New Jersey husband instituted a divorce proceeding in North Dakota. His wife sought and received from a New Jersey court an injunction against prosecution of the divorce suit. The enjoining court conceded that the wife might have entered a special appearance in North Dakota to challenge jurisdiction on the ground that the husband was not domiciled in North Dakota, but this appearance would have been inconvenient for the wife. Moreover, continued the court, "it is common knowledge that the courts of Dakota assume jurisdiction . . . based on a residence . . . of the plaintiff [husband] which falls far short of . . . actual domicile. In fact, they are satisfied with a mere temporary residence adopted for the purpose of obtaining a divorce . . . the task of satisfying the [Dakota] court that her husband was not a bona fide domiciled resident of the state would be well-nigh hopeless." *Id.* at 96, 43 A. at 97-98. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 228 (3d ed. 1977); Comment, *Marriage by Injunction: A Study of the Problems Enjoining Divorce*, 10 VILL. L. REV. 108 (1964). As domicile was at that time an unquestioned basis for subject matter jurisdiction, *see* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 222-24 (3d ed. 1977), the court's grant of injunctive relief appears to rest on a suspicion that the other court will not find the facts correctly or will not correctly apply the legal standard raised by the facts. The injunction issued because of a suspicion that the judicial process of another state would function improperly.

Federal Court Injunction of State Court Proceedings

The theoretical difficulties that arise when a court of one sovereign attempts to enjoin a court of another sovereign are more acutely posed when a federal court attempts to enjoin inequitable state court litigation. When a party seeks a federal injunction against allegedly inequitable state court proceedings, he or she faces two obstacles. First, the Anti-Injunction Act forbids such relief and appears to contain only narrow exceptions to its prohibition.[140] The broad language in the Court's pre-*Kline* decisions, moreover, would seem to bar such relief, even if the Act did not exist.[141] Second, the Supreme Court has statutory authority to review federal law issues decided in state court proceedings.[142] The lower courts should avoid the exercise of a review function entrusted to the Supreme Court, or the domains of both the Court and the states will be invaded. Any intrusion by the lower federal courts rests on the premise that legal proceedings may work inequity on a party and the appellate process offers no effective relief.

Recent decisions have refused to enjoin allegedly inequitable state proceedings. In 1970, in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,[143] the railroad had obtained a state court injunction of the union's picketing.[144] The union unsuccessfully sought dissolution of the injunction in state court. The union then obtained injunctive relief in federal district court against the enforcement of the state court injunction. The Supreme Court reversed in an opinion by Justice Black. According to the Court, the Anti-Injunction Act prohibits relief unless the plaintiff can find a specific exception. This prohibition merely reinforces the original design of the first Congress that the Supreme Court, and not the district courts, review the judgments of state courts. Finding no exception in the Act for this case, the Court vacated the federal injunction.[145]

Justice Black's analysis may capture the intent of the first Congress, but it gives inadequate attention to modern realities. Even if the

140. See note 42 *supra*.

141. See notes 46-72 & accompanying text *supra*.

142. Under 28 U.S.C. § 1257(2) (1976) the Court has appellate jurisdiction when the losing party has challenged a state statute under the supremacy clause.

143. 398 U.S. 281 (1970).

144. A subsequent decision of the Supreme Court in a related case, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), made it reasonably clear that the state court had erred in *Atlantic Coast* in granting the injunction. The unions had a federally protected right to picket under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), and that right could not be interfered with by state court injunctions. 394 U.S. at 386.

145. "Only the Supreme Court was authorized to review on direct appeal the decisions

Supreme Court has appellate jurisdiction over a case arising in the state courts, its ability to give meaningful review is greatly reduced by its staggering docket.[146] While the state court proceedings may have allowed the appellant to build a good record for Supreme Court review, that party might justifiably prefer federal district court proceedings for a more careful disposition of federal issues.[147] This preference does not reflect on the ability or fairness of the state courts, but rather is a statement that the Supreme Court cannot give the same extended consideration to cases that it gave one hundred and fifty years ago.

Enjoining Judgments

Justice Black's opinion also does not adequately reflect the tradition of equitable intervention into state court proceedings. The federal courts have most often intruded into state proceedings when the federal plaintiff has alleged that his or her opponent has obtained an inequitable judgment, which the holder is presumed to intend to enforce. A state judgment could be inequitable because it has been obtained through fraud,[148] a well-recognized basis of relief upon which the federal courts have acted[149] even though the state courts could have granted the same relief. The federal courts have also found inequity in judgments that rest upon "incorrect" choices of law,[150] the doctrine of

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of state courts. . . . Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. . . .

Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 398 U.S. at 286-87.

146. *See* Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977).

147. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (recognizing the possible preference for federal trial court determination of facts relevant to federal law issues).

148. See text accompanying notes 134-37 *supra*.

149. Marshall v. Holmes, 141 U.S. 589, 599 (1891).

150. Supervisors v. Durant, 76 U.S. (9 Wall.) 415 (1869). See notes 125-26 & accompanying text *supra*. In these cases, the state court was found to have chosen incorrect law because it did not choose the federal common law that a federal court would have chosen. See note 154 *infra*.

In the era of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), a state court was not obliged to apply federal common law. Thus, in the cases about to be examined, the federal courts not only fashioned a rule at variance with local law, but also branded as inequitable the state courts' refusal to accept the federal rule, even though they had no general obligation to do so. These cases are analogous to Cole v. Cunningham, 133 U.S. 107 (1890), discussed in the text accompanying notes 127-33 *supra*. On one level, the complete overhaul of federal common law makes museum pieces of these cases, but they illustrate a willingness—perhaps continuing—to enjoin when state courts have rendered an erroneous judgment.

Cole v. Cunningham.[151] The federal courts have enjoined enforcement of state court judgments even though appellate review by the Supeme Court would be available.[152]

This intervention is not the general rule, as suggested in *Atlantic Coast*.[153] Moreover, the older cases arose over the application of federal common law, which is no longer an area of controversy.[154] None-

151. See notes 127-33 & accompanying text *supra*.

152. *See* Hill v. Martin, 296 U.S. 393, 403 & n.19 (1935); Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920); Supervisors v. Durant, 76 U.S. (9 Wall.) 415 (1870).

153. See notes 143-45 & accompanying text *supra*.

154. Before the Court abandoned general federal common law in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), it permitted federal common law to conflict directly with a state's common law. *See* Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893). Thus, it was possible for a state to employ a different and "incorrect" common-law rule, even though the state courts were not obliged to adhere to the federal rule of decision.

In Supervisors v. Durant, 76 U.S. (9 Wall.) 415 (1869), local citizens had obtained a state court injunction against taxation to satisfy defaulted municipal bonds. The state suit had been filed and concluded before the federal plaintiff, a bondholder and one of the defendants in the prior state suit, sought relief. The Supreme Court approved mandamus ordering the local officials to levy taxes for payment of the bonds. Although the Court granted mandamus, not an injunction, the decision is questionable. Because the state proceedings began first, the Court's earlier decisions—especially Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867)—should have led to preeminence for the state judgment.

The Iowa Supreme Court previously had approved the statute under which the bonds had been issued. When defaults became imminent, the Iowa court changed its mind about the statutory authorization for the bonds. *See* Gelpecke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205 (1863). Both state and federal courts should have followed the Iowa Supreme Court's construction. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). The Supreme Court declared that in federal courts, the earlier state court construction would apply, even though the state court had abandoned its initial position. Gelpecke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205 (1863).

This difference of opinion gave rise to a startling result in *Durant*. The bondholders could have argued in state court that the proposed injunction would deprive them of constitutional rights. If unsuccessful, they could have sought review by the United States Supreme Court on the constitutional issue. The Court could not reverse the state court for its refusal to apply federal common law. The bondholders were allowed to avoid the constitutional issue, however, and obtain a different result by seeking a collateral remedy in the federal circuit court. Because the Supreme Court disagreed with the state court's result, federal courts could provide a remedy to make the earlier judgment meaningless.

This analysis reappeared in 1920, in Wells Fargo & Co. v. Taylor. 254 U.S. 175 (1920). Taylor worked as a messenger for Wells Fargo and was injured during his employment while riding on a train operated by a third-party railroad. To secure employment, he had signed an agreement assuming all risk for injuries, holding Wells Fargo and the carrier harmless from liability. In tandem with this agreement, Wells Fargo had agreed with the railroad to hold it harmless from injury to its employees or its property. Taylor sued the railroad in state court and obtained a favorable judgment because the court refused to enforce the hold-harmless agreement. 58 So. 485 (Miss. 1912). The employer then obtained a federal injunction forbidding the execution of this judgment. Invoking diversity jurisdiction, the employer argued that Taylor would be acting inequitably if he were to attempt enforcement of a judgment procured in violation of his agreement. The Court decided that the applicable federal statute did not prohibit the agreement and implicitly decided that

theless, the use of federal injunctions against "incorrect" state judgments remains vital.[155] If the court finds inequity, it will grant relief, notwithstanding the theoretical availability and wisdom of normal appellate review.[156]

Vendo Co. v. Lektro-Vend Corp.,[157] a 1977 United States Supreme Court decision, illustrates the continuing inclination to enjoin an incorrect judgment. Stoner sold his vending machine company to Vendo and entered into a non-competition agreement. When Stoner commenced a relationship with a Vendo competitor, Lektro-Vend, Vendo brought suit in state court for breach of the covenant. Lektro-Vend and Stoner set up federal antitrust defenses; they also brought a separate antitrust action in federal court.[158] The defendants in state court withdrew their federal antitrust defenses.[159] When, after many years of litigation, the Illinois Supreme Court affirmed a substantial judgment against Lektro-Vend and Stoner, and the Supreme Court denied certiorari,[160] they reactivated their federal suit and requested an injunction

federal common law would uphold the agreement, thus concluding that to enforce the judgment would be inequitable. 254 U.S. at 189. *Wells Fargo* thus denied effect to a final state judgment that the Court considered inequitable merely because it rested on an ostensibly permissible choice of law with which the Court disagreed. The Court found no obstacle in the Anti-Injunction Act, which referred to state court "proceedings," because judgment is outside the scope of "proceedings." *Id.* at 184-86. Thus, *Wells Fargo* made deference to state proceedings purely formal, because the effect of recognizing a distinction between proceedings and a judgment, in determining the applicability of the Anti-Injunction Act, was that the holder of a state court judgment could not confidently expect that it would be respected by federal judges.

155. *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977), see notes 157-68 & accompanying text *infra*.

156. *See* NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); Porter v. Lee, 328 U.S. 246 (1946); Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); United States v. Adams, 634 F.2d 1261 (10th Cir. 1980).

Nash-Finch is a telling example. In Amalgated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955), the Court had previously refused to approve a federal injunction against a state court order that prohibited union activity. The *Richman* Court required exhaustion of state appellate remedies, even though first amendment rights would be denied in the interim. In *Nash-Finch*, however, the Court allowed the NLRB to secure the same type of relief it had denied the union in *Richman*. To support this result, the Court found an "implied" exception to the Anti-Injunction Act, a suspect methodology if *Atlantic Coast* is to be taken seriously. It is understandable that for reasons of policy, the Court would be more inclined to grant relief at the behest of an administrative agency with specialized experience. But this type of consideration is not mentioned in *Atlantic Coast*, which emphasizes state autonomy and the integrity of the appellate process.

157. 433 U.S. 623 (1977).

158. The federal court suit alleged that Vendo had violated §§ 1 and 2 of the Sherman Act (codified at 15 U.S.C. §§ 1, 2 (1976)). 433 U.S. at 627.

159. 433 U.S. at 627.

160. 58 Ill. 2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

against enforcement of the state court judgment based on section 16 of the Clayton Act,[161] which authorizes any person to seek injunctive relief against violations of the federal antitrust laws. The injunction was granted by the lower federal court.[162]

The Supreme Court reversed, denying the injunction. A plurality of three justices, relying on *Atlantic Coast*,[163] declared that the federal courts may not enjoin state proceedings unless a federal statute expressly authorizes an injunction. The Clayton Act's general grant of injunctive relief was not an express grant. The plurality could find no indication in the legislative history that Congress thought the antitrust laws could be given their intended scope only by a stay of state court proceedings.[164] Accordingly, the plurality did not consider whether Vendo would engage in inequitable conduct by enforcing the judgment. Chief Justice Burger and Justice Blackmun concurred in the result, but disagreed with the plurality's conclusion that the Anti-Injunction Act barred this remedy. Instead, they denied relief because there was no "pattern of baseless, repetitive claims."[165] In their view, a single lawsuit should not normally be considered inequitable conduct.

Four dissenters stated that the Anti-Injunction Act was no obstacle[166] and that even a single lawsuit, as in this case, could constitute a violation of the antitrust laws and merit injunctive relief.[167] According to the dissent, a judgment contrary to federal law is an inequitable judgment. If the restrictive covenant violated federal antitrust law, a federal court could enjoin enforcement of the covenant even when it is embodied in a state court judgment. As the federal courts have exclusive jurisdiction over claims arising under antitrust law, the state court defendant is not obliged to raise an antitrust defense, although it may elect to do so. If the state court defendant chooses not to raise a federal defense and loses in the state courts, he or she may seek an injunction and obtain review in the district court.[168]

161. 15 U.S.C. § 16 (1976).

162. The district court held that the injunctive relief provision of the Clayton Act constitutes an express exception to 28 U.S.C. § 2283, the Anti-Injunction Act. 403 F. Supp. at 536.

163. See notes 143-45 & accompanying text *supra*.

164. 433 U.S. at 631-41.

165. 433 U.S. at 644, (quoting California Motor Transp. v. Trucking Unlimited, 404 U.S. 503, 513). The concurring Justices also held open the prospect of relief on "some equivalent showing of grave abuse." *Id.* at 644 n*.

166. 433 U.S. at 646-51 (Stevens, J., dissenting).

167. *Id.* at 651-54 (Stevens, J., dissenting).

168. *Id.* at 664-66 (Stevens, J., dissenting). The dissent followed *Wells Fargo* but made an improvement. See note 154 *supra*. Their proposed choice of law was the objectively correct law, not just an alternative that the state courts might have legitimately rejected.

Thus, the dissenters took the position that an incorrect judgment may violate federal antitrust law and, accordingly, that its enforcement may be enjoined. While appellate review by the Supreme Court of the federal law issues technically was unavailable because the state court defendants had withdrawn their federal defenses, the dissenters suggested that this withdrawal must be permissible if exclusive jurisdiction is to have full meaning. In addition, the four dissenters suggested that it was wise to withdraw the federal issues from the state suit because the Illinois state courts had been slow in deciding the case. In principle, the dissenters thus approved the immediate attempt by a state court defendant to obtain federal injunctive relief before the state claim should go to judgment. The dissenters relied, therefore, on the federal courts' exclusive jurisdiction over the federal law issues in *Lektro-Vend*. The Court's earlier decisions in the *Lektro-Vend* tradition, however, did not carry that limitation. *Lektro-Vend* is a strong reminder that *Atlantic Coast*'s rigidity[169] is misleading.

Their analysis does share a difficulty with *Wells Fargo*. If the state court has applied the wrong standard, its judgment might be viewed as inequitable only if the defendant has no opportunity to seek Supreme Court review. In *Lektro-Vend*, the defendants were not denied this opportunity; they renounced it and instead sought duplicative proceedings. But the dissent can be supported on the grounds that state courts cannot make a binding disposition of the antitrust issue because federal courts have exclusive jurisdiction over claims arising under the antitrust laws. Accordingly, a party may forego a federal defense and present it as an equitable claim after an unfavorable state judgment has been rendered. If the other party could force state court litigation of antitrust issues through the device of a breach of contract suit, the grant of exclusive jurisdiction would be circumvented. Direct review of antitrust defenses by the Supreme Court does not equal the type of enforcement envisioned by Congress when it granted exclusive jurisdiction over these claims to the lower federal courts.

The Court has not yet ruled on the res judicata effect of state court judgments when federal courts have exclusive jurisdiction over a class of claims. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674 (1978) (Brennan, J., dissenting); Note, *The Securities Exchange Act and the Rule of Federal Jurisdiction*, 89 YALE L.J. 98 (1979). Of course, in *Lektro-Vend*, the Court's ultimate disposition protected the state court judgment from collateral review.

The dissenters in *Lektro-Vend* went beyond *Wells Fargo* in one respect. In *Wells Fargo*, the state and federal courts disagreed upon a legal issue; the state court judgment was inequitable because it rested upon an "incorrect" interpretation of the law. In *Lektro-Vend*, the dissenters would require the district court to wrestle with a difficult factual or mixed law-fact question: whether a restrictive covenant was an unreasonable restraint of trade. For a discussion of the complex questions in such a decision, see Goldschmid, *Antitrust's Neglected Stepchild: A Proposal For Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973). Federal intervention might impose a heavy burden on the district court to make time-consuming factual inquiries that either had been made or could have been made in the state court. The federal plaintiff in *Lektro-Vend* ultimately did not obtain his federal injunction; but the fragmentation of the Court indicates that *Wells Fargo* may retain some vitality inasmuch as the dissenters thought a "wrong" choice of law could be enjoined by a federal trial court.

169. See notes 143-45 & accompanying text *supra*.

Equitable Intervention into Criminal Proceedings

The courts have discouraged overlapping litigation that is purely civil in nature. This general distaste has given way at times to curb inequitable proceedings. Similarly, in the context of criminal proceedings that overlap or promise to overlap with civil proceedings, the courts have avoided duplicative litigation, but have remained sensitive to the potential for inequity in the conduct of litigation. The courts have shown reluctance to enjoin pending criminal charges.[170] Difficult factual questions relating to guilt or innocence make preliminary relief unattractive. When criminal charges are only threatened, however, the courts have shown a greater willingness to intrude.[171] A threat of prosecution may not only stifle conduct, but also may deny the citizen meaningful judicial review of questionably valid criminal statutes. The vexing policy questions raised in these situations had received only tentative consideration by the state courts when the Supreme Court began to grant equitable relief on a broad basis.[172]

Equitable Relief: General Considerations and Early Development in the State Courts

Equity generally refused to enjoin a previously instituted criminal case.[173] The suitor was thought to have an adequate remedy at law, that is, to interpose his or her defenses in the criminal trial.[174] Not only did law provide the suitor an adequate remedy, but equity lacked the

170. *See* Sherod v. Aitchison, 71 Or. 446, 142 P. 351 (1914); J.W. Kelly & Co. v. Conner, 122 Tenn. 339, 123 S.W. 622 (1909).

171. *E.g.*, Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915).

172. *Ex Parte* Young, 209 U.S. 123 (1908).

173. For instances where criminal charges were brought, see Liu v. Varr, 39 Hawaii 23 (1950); Yates v. Village of Batavia, 79 Ill. 500 (1875); State *ex rel.* City of New Orleans, 48 La. Ann. 448, 21 So. 28 (1896); Wallack v. Society for the Reformation of Juvenile Delinquents, 67 N.Y. 23 (1876); West v. Mayor of New York, 10 Paige 539 (N.Y. Ch. 1844); Lockward v. Baird, 59 N.D. 713, 231 N.W. 851 (1930); Kelly v. Conner, 122 Tenn. 339, 123 S.W. 622 (1909); Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905); Lord Montague v. Dudman, 28 Eng. Rep. 253 (Ch. 1751); Holderstaffe v. Saunders, 87 Eng. Rep. 780 (Q.B. 1703); Z. CHAFEE, CASES ON EQUITABLE REMEDIES 224-270 (1939); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.11, 7.4 (1973); 1 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §§ 68, 273 (3rd ed. 1890); H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 173 (1948); 1 T. SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES §§ 24, 71 (2d ed. 1901); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 893 (12th ed. 1977); Whitten, *Federal Declaratory and Injunctive Interference with State Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 597-616 (1975); *Developments in the Law, Injunctions*, 78 HARV. L. REV. 994, 1024-27 (1965); *Annot.*, 1916C L.R.A. 263 (1916).

174. *See, e.g.*, Thompson v. Van Lear, 77 Ark. 506, 92 S.W. 773 (1906); Phillips v. Mayor of Stone Mountain, 61 Ga. 386 (1878); Ewing v. Webster City, 103 Iowa 226, 72

ability to give complete relief because the chancellor had no power to punish for violations of the criminal code.[175] Consideration of the merits of the suitor's bill might duplicate the law courts' determinations.[176] If a suitor would prevail with the arguments that could be presented as a defense in the law court, the chancellor might give relief and conclude the dispute. If, however, all the suitor's arguments would be unpersuasive, the chancellor was unable to try the general issue and was obliged to send the suitor back to the law courts, where the case would be reconsidered. The suitor might then raise as defenses the arguments rejected by the chancellor. This process would delay whatever condemnation and punishment the accused might deserve. Rather than risk lengthy and possibly duplicative efforts, equity required the petitioner to present his or her case to the one forum that could provide a complete resolution of the dispute.

Equity's rigidity could be lessened in practice through the use of pretrial habeas corpus. If the criminal defendant needed speedy relief on a controlling legal issue, pretrial habeas corpus provided relief by freeing a prisoner from illegal detention.[177] For example, an unconstitutional statute[178] or an insufficient indictment[179] would render detention illegal and accordingly warrant the grant of pretrial habeas corpus.[180] Through habeas corpus, a prisoner had an important device to halt his or her prosecution.

Habeas corpus also was limited. The defendant had to be held in custody, a requirement not satisfied if he or she had been released on bail.[181] In addition, the writ was of no use for one concerned about the

N.W. 511 (1897); Sherod v. Aitchison, 71 Or. 446, 142 P. 351 (1914); Kelly v. Conner, 122 Tenn. 339, 123 S.W. 622 (1909); Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905).

The availability of pretrial habeas corpus, see text accompanying notes 177-83 *infra*, would also preclude injunctive relief. *See* Buffalo Gravel Corp. v. Moore, 201 App. Div. 242, 194 N.Y.S. 225, *aff'd*, 234 N.Y. 542, 138 N.E. 439 (1922).

175. *See* Hemsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891); Suess v. Noble, 31 F. 855 (C.C.S.D. Iowa 1887); Liu v. Farr, 39 Hawaii 23 (1950).

176. *See* Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905); Note, *Injunction Against Search by Police Officers*, 25 MICH. L. REV. 892 (1927).

177. For detailed treatments, see W. CHURCH, HABEAS CORPUS §§ 230-38 [hereinafter cited as CHURCH] (1884); Oaks, *Habeas Corpus in the States—1776-1885*, 32 U. CHI. L. REV. 243, 258-61 (1965).

178. *See Ex parte* Siebold, 100 U.S. 371 (1879).

179. *See In re* Corryell, 22 Ga. 178 (1863); *Ex parte* Prince, 27 Fla. 196, 9 So. 659 (1891); *In re* Dassler, 35 Kan. 678, 12 P. 130 (1886); *In re* Prime, 1 Barb. Ch. 340 (Sup. Ct. N.Y. Co. 1847).

180. The prisoner could also employ habeas corpus as a device to obtain release on bail. *See* CHURCH, *supra* note 177, § 233.

181. Stallings v. Splain, 253 U.S. 339 (1920).

legality of contemplated future conduct. Even if a person were willing to take an action that would result in custody, a favorable decision and a grant of the writ would have no res judicata effect to protect similar conduct in the future.[182] Finally, habeas corpus would be of no practical value to a corporation concerned about its rights under the law.[183]

By the end of the nineteenth century, equity began to allow challenges to penal laws by those who were threatened with criminal prosecution.[184] If no prosecution was pending, equitable relief posed no threat of duplicative proceedings. More importantly, the threat of the criminal process can stifle conduct that may have legitimate claims to protection.[185]

182. *See* CHURCH, *supra* note 177, § 386a.

183. The corporation might often be unable to find an employee who would be willing to expose himself or herself to prosecution. *See Ex parte* Young, 209 U.S. 123, 145 (1908).

184. *See* Port of Mobile v. Louisville & N. R.R., 84 Ala. 115, 4 So. 106 (1887); Sullivan v. San Francisco Gas & Elec. Co., 148 Cal. 368, 83 P. 156 (1905); City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106 (1883); City of Louisville v. Lougher, 209 Ky. 299, 272 S.W. 748 (1925); New Orleans Baseball & Amusement Co. v. City of New Orleans, 118 La. 228, 42 So. 784 (1907); Mayor v. Radecke, 49 Md. 217 (1878); Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, 32 S.W. 649 (1895) (municipal ordinance); Continental Oil Co. v. City of Santa Fe, 25 N.M. 94, 177 P. 742 (1918); Wood v. City of Brooklyn, 14 Barb. ch. 425 (N.Y. Sup. Ct. 1852); City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 28 S.W. 528 (1894); Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915); *see also Annot.*, 1916C L.R.A. 263 (1916).

Whether a proceeding is pending or merely threatened is examined in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1023-24 (2d ed. 1973).

185. A hypothetical case demonstrates the justification for awarding equitable relief against a threatened prosecution. X has conducted a business in which, as part of his normal operation, he engages in certain activity on a regular basis. X seriously doubts the validity of newly enacted legislation that would regulate this conduct. The district attorney immediately informs him that prosecution will follow if he should continue the proscribed activity. X is placed in a dilemma: if he ceases, he gives up or renders less profitable a valuable enterprise. By foregoing his conduct, he foregoes all realistic opportunity to challenge the suspect legislation. He has little prospect of a successful legal action against any government official for the damage done to his business. Government officials whom he might sue for damages will assert official immunity as a defense in any suit for damages. *See* Theis, *Official Immunity and the Civil Rights Act*, 38 LA. L. REV. 281 (1978). They may also prevail on an alternative argument that X should have tested the law in a criminal prosecution and should not have backed away from confrontation so quickly. *See Ex parte* Young, 209 U.S. 163 (1908). Even if he should obtain a civil judgment at law, it might remain unsatisfied if the right that X claims is a valuable one. Traditionally, the inability of the defendant to pay a judgment at law strengthened the plaintiff's case for equitable relief. *See* H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 47 (2d ed. 1948).

That someone else may be so bold as to violate the law and win a victory in a criminal case is also problematic. If, he violates the legislation, on the other hand, he makes himself an accused criminal and exposes himself to possible conviction and punishment. The burdens of being an accused criminal may not be worth the risk. X may receive no definitive treatment of his legal argument in a criminal case. The case may be decided in his favor, but

Equitable relief was available even though actual threats of prosecution were not communicated to the citizen who questioned a penal statute,[186] although actual threats make the strongest claim on the chancellor's conscience. The existence of new legislation that clearly prohibits a citizen's conduct should assure the court that the citizen has a genuine grievance.[187] When a citizen has received no actual threats, however, and claims a threat from old statutes never enforced or from new statutes that seem to have no bearing on his or her conduct, the court may be reluctant to grant relief.[188]

Additionally, it is not necessary that the legislation interfere with property or business rights. The older cases sometimes carried this suggestion,[189] but it has not been followed.[190] It is clear today that courts will give equitable relief when nonproperty rights are involved.[191]

Two recent Supreme Court cases demonstrate that equity will grant relief against a prospective prosecution.[192] In *Abbott Laboratories*

on narrow grounds that do not bear on his main concern. Indeed, a single violation, to provide a "test case," which may not be treated as a test case, brings all the disabilities of the criminal process, but may require, possibly for a number of months or even years, forbearance from the conduct in question. To continue business as usual, to engage in repeated violations, and to defend numerous prosecutions, increases his difficulties to a level that most prudent persons would find unacceptable. By their nature, then, threats of the invocation of the criminal process do not provide the adequate remedy at law, which the pending criminal proceeding may provide. Hence, equity has sought to relieve the individual from the dilemma that threats present.

186. *E.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Sandelin v. Collins, 1 Cal. 2d 147, 33 P.2d 1009 (1934); Adams v. Slavin, 225 Ky. 135, 7 S.W.2d 836 (1928); Bank of Yorktown v. Boland, 280 N.Y. 673, 21 N.E.2d 191 (1939). *But see* Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445 (1943).

187. *See* Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923).

188. *See* Poe v. Ullman, 367 U.S. 497 (1961).

189. *See, e.g.*, City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 28 S.W. 528 (1894); *cf.* Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818) (originating the notion that equity protects only property rights). Effective criticism of the doctrine originating in *Gee* appears in Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

190. *See, e.g.*, Truax v. Raich, 239 U.S. 33, 38 (1915) (employment at will a property right); City of Louisville v. Lougher, 209 Ky. 299, 272 S.W. 748 (1915) (employment to deliver speeches a property right).

191. *See* Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946); Smith v. State, 242 So. 2d 692 (Miss. 1970); Covarrubia v. Butler, 502 S.W.2d 229 (Tex. Civ. App. 1973); Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915); Smith v. Daily Mail Pub. Co., 248 S.E.2d 269 (W. Va. 1978), *aff'd on other grounds*, 443 U.S. 97 (1979). *But see* Cantrell v. Mayor of Mt. Airy, 218 Ga. 646, 129 S.E.2d 910 (1963); State v. Eubanks, 368 P.2d 253 (Okla. Crim. 1962).

192. This analysis is not peculiar to a threat of criminal proceedings. Possible administrative sanctions create similar dilemmas for the citizen, and the courts have accordingly granted injunctive relief. In Columbia Broadcasting System v. United States, 316 U.S. 407

v. Gardner,[193] manufacturers of pharmaceutical drugs sought injunctive and declaratory relief against a labeling regulation promulgated by the Commissioner of the Food and Drug Administration. They asserted that the regulation exceeded the scope of congressional delegation of power. Were they to fail to comply with the regulation, they would be subject to criminal and civil actions. The Court granted the relief sought.

> If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance . . . may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.[194]

The Court granted relief even though the Solicitor General had disavowed the government's intent to invoke the criminal process to advance its position. A "threat" existed when the suit was filed because the proposed conduct clearly violated legal norms and the petitioners had no reason to believe the government would ignore the violations.

In *Ostereich v. Selective Service System*,[195] the Court gave similar protection to first amendment rights. The plaintiff, a divinity student, had been granted an exemption from military service. When he returned his registration certificate to his local draft board to express dissent from United States military policies, his local draft board ordered him to report for induction into the armed services. By statute, no judicial review might be had of a local board decision, except as a defense to a criminal prosecution for failure to obey the induction order.[196] It was conceded that an inductee might also obtain review by habeas corpus after he had submitted to induction and found himself in mili-

(1942), the plaintiff, a radio network, attacked Federal Communications Commission (FCC) regulations that would have drastically altered the network's relationship with its members. The FCC regulations declared that the Commission would deny a license or renewal of a license to an individual station unless that station's contract with its network met certain conditions. The CBS standard contract materially deviated from the FCC guidelines. Before the regulations became effective, CBS began to receive word from individual stations that they intended to abrogate or not to renew their contracts with CBS. The Court approved the availability of injuncitve relief to test the regulations. Licensing proceedings would not give the network adequate relief. The threat of loss of license was so severe that compliance was more likely than challenge. When the government has created a potent disincentive to violate its standards, the citizen may appropriately challenge these standards without violating them.

193. 387 U.S. 136 (1967).

194. *Id.* at 152-53.

195. 393 U.S. 233 (1968).

196. Military Selective Service Act of 1967, 50 U.S.C. § 451 (1967).

tary custody.[197] Nonetheless, the Court approved injunctive relief. The board had no statutory authority to strip the plaintiff of his exemption in retaliation for dissent. Because the board's action was clearly lawless, the Court could neither countenance the delay of postinduction review nor be persuaded that Congress intended to delay review in such a case. A criminal proceeding was "threatened" because the petitioner desired a course of conduct to which a criminal penalty was attached and for which it would likely be invoked. The Court considered unfair the proposition that a person must invite prosecution to determine his or her rights.[198]

With some uniformity, the cases have confined injunctive relief to those situations in which the plaintiff can demonstrate that the challenged law is unconstitutional or in no way applies to his or her conduct.[199] The courts attempt to avoid a decision that rests upon an assessment of facts, even stipulated facts, that would present a question of fact about the suitor's guilt or innocence.[200] If the question presented to the chancellor is factual, his or her judgment may do little to clarify the statute. Distaste for proliferation of litigation explains an equity court's refusal to make factual determinations.[201] Unless the suitor can present the chancellor with a clearly severable legal issue that promises to sanction the suitor's conduct, the chancellor has little reason to interfere with a controversy more easily settled in criminal court.[202]

Moreover, a court may be reluctant to grant equitable relief when "consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce"[203] the challenged provisions. Unless a court can foresee the implications of a proposed declaration of invalidity, it may prefer to hold back its relief until relief is absolutely necessary. A general declaration of invalidity may impair unforeseeable applications of a statute that are permissible and desirable.

197. 393 U.S. at 238.

198. *Id.*

199. *See, e.g.*, Wood v. City of Brooklyn, 14 Barb. Ch. 425 (N.Y. Supp. Ct. 1852); Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915).

200. *E.g.*, Davis v. ASPCA, 75 N.Y. 362 (1878).

201. *E.g.*, Mills Novelty Co. v. Sunderman, 266 N.Y. 32, 193 N.E. 541 (1934); Troy Amusement Co. v. Attenweiller, 137 Ohio St. 460, 30 N.E.2d 799 (1940).

202. *See* Joyner v. Hammond, 199 Iowa 919, 200 N.W. 571 (1924); Harmon v. Police Commissioner, 274 Mass. 56, 174 N.E. 198 (1931); Municipal Telegraph Co. v. McCreary, 77 N.Y.S. 409 (Sup. Ct. 1902); Note, *Injunction Against Search By Police Officers*, 25 MICH. L. REV. 892 (1927).

203. Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171 (1967).

Distinguishing between questions of law and questions of fact may be difficult.[204] When the suitor makes no attack on the statute, but merely alleges that he or she has not violated its provisions, a court's reluctance to intervene is nearly absolute.[205] Charges brought without evidence can intimidate a citizen and discourage protected and unprotected conduct. Traditionally, the courts have refused to intervene, reasoning that only a full trial can determine these issues and that such a trial would duplicate criminal proceedings. A minority of courts refuse to enjoin a threatened prosecution unless the suitor challenges the constitutionality of the law; they refuse to entertain a claim that the statute does not extend to the suitor's conduct.[206] A majority of courts, however, will consider all legal attacks on the statute,[207] and will not be confined to certain constitutional claims.[208]

Suits for injunctive relief from criminal prosecution may arise in one of two circumstances: when a prosecution is pending with no others threatened and when a prosecution is threatened with no others pending. "Hybrid" situations, however, present more difficult and more realistic problems. The suitor may file for equitable relief and then have charges lodged against him or her. Alternatively, while faced with pending charges, the suitor, desiring to engage in the same conduct again, may pursue an injunction.

The situation in which a suitor files for equitable relief and then has charges lodged against him or her has arisen frequently. If the equity suit raises the same issues that the citizen would present as a defense in the criminal court, equitable relief could issue on the theory that the court first to obtain jurisdiction should retain the jurisdiction to the exclusion of other courts.[209] This course of action could produce duplication if the chancellor should reject the suitor's arguments, which could be presented again as a defense to the criminal charges. Nonetheless, when the suitor wishes to pursue a continuing course of conduct, an equitable remedy would provide certainty regarding future conduct. A pending charge does not answer immediate questions

204. *Compare* Fein v. Local Bd., 405 U.S. 365 (1972) *with* Clark v. Gabriel, 393 U.S. 256 (1968).

205. If no evidence supported the charge, a prisoner might avail himself or herself of pretrial habeas corpus. *See* CHURCH, *supra* note 177, §§ 236-37; *see also* cases cited in note 202 *supra*.

206. *See* Arbuckle v. Blackburn, 113 F. 616, 625 (6th Cir. 1902).

207. *See* Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

208. *See* New Orleans Baseball & Amusement Co. v. City of New Orleans, 118 La. 228, 42 So. 784 (1907).

209. *See* Mayor of York v. Pilkington, 26 Eng. Rep. 584 (Ch. 1742). *But see* Saull v. Browne, 10 L.R.-Ch. App. 64 (1874).

about proposed conduct, which the suitor might abandon to avoid further charges.

In most of the early state cases, the suitor had been charged and convicted before he or she sought injunctive relief.[210] Denying injunctions, the courts reasoned that the citizen's appeal was an adequate remedy, which should not forestall further enforcement during the appeal process.[211] This approach avoids duplicative proceedings, but may also discourage continued exercise of constitutional or legal rights after conviction by the trial court.

When a conviction has not yet been entered, an injunction may be appropriate, even though criminal charges have been filed first. Refusing to grant an injunction would ignore the potency of the criminal penalty to enforce regulation of business practices that may occur frequently. To deny equitable relief because of a single pending charge would present the suitor with the dilemma of foregoing irreplaceable rights or incurring a staggering penalty. The dilemma can be particularly harsh because a pending charge may not necessarily resolve the crucial issues that would be presented in an equity suit. Thus, although an injunction may duplicate efforts, the duplication is necessary to free the suitor from a peril that the pending proceedings do not dispel. Treatment of the hybrid cases had not received comprehensive treatment by the state courts when the federal courts began to take the lead to this area.[212]

210. *See* Mayor of Moultrie v. Patterson, 109 Ga. 370, 34 S.E. 600 (1899); Philips v. Mayor of Stone Mountain, 61 Ga. 386 (1878); Chicago B. & Q. R.R. v. City of Ottawa, 148 Ill. 397, 36 N.E. 85 (1894); Poyer v. Village of Des Plaines, 123 Ill. 111 (1887); Ewing v. Webster City, 103 Iowa 226, 72 N.W. 511 (1897).

211. One court explicitly approved further prosecutions if there should be further violations during this period. Poyer v. Village of Des Plaines, 123 Ill. 111 (1887).

If a conviction relieves a citizen of the dilemma of an untested law, denying the injunction may be satisfactory. Although the citizen may not agree with the trial court's conclusion, the uncertainty has been reduced. The suitor's continued disagreement may be reviewed by appeal. However, the convictions in these cases were often entered by a justice of the peace, whose conviction perhaps should not preclude equitable relief. *See* Ostrahder v. Linn, 237 Iowa 694, 22 N.W.2d 223 (1946). Even if the justice of the peace has the power to invalidate a statute, he or she is unlikely to make new law or even to appreciate legal arguments. *See, e.g.*, Lecates v. Justice of the Peace Court, 637 F.2d 898 (3d Cir. 1980). A conviction in these circumstances might say very little about the worth of the citizen's legal arguments.

212. Modern state court decisions have shown an unwillingness to intervene in hybrid situations, but seem to have assumed that the prosecution was truly a test case: The defendant would be prosecuted only for violations commencing after a determination of the law's validity. *See* Grimm v. County Comm'rs, 252 Md. 626, 250 A.2d 866 (1969); Norsica v. Board of Selectmen, 368 Mass. 161, 330 N.E.2d 830 (1975).

The adoption of the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. III 1979), had

Federal Intervention in State Criminal Proceedings

When federal courts are asked to interfere in state criminal proceedings, the intervention may lead to duplication, but may be necessary to avoid inequity. The Supreme Court has freely granted relief, using doctrines that state courts hesitated to adopt. In its decisions, the Court has relied heavily on the principles developed in the context of overlapping civil suits.

Historically, federal intervention was not wholeheartedly accepted. The Court's treatment of federal habeas corpus jurisdiction over state prisoners showed its willingness to allow state proceedings to continue and vindicate the prisoner's claims.[213] In *Ex parte Royall*,[214] the prisoner had been indicted for selling tax coupons without a license. Although free on bond for a year, he had surrendered himself to state custody and sought federal habeas corpus,[215] claiming that the state statute he allegedly violated deprived him of property rights without due process of law. The Court acknowledged that the federal habeas corpus statute[216] clearly granted power to entertain and dispose of his contention that the state statute was unconstitutional, but qualified its finding:

> The [statutory] injunction to hear the case summarily . . . does not deprive the court of discretion . . . which . . . should be exercised in

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little material effect upon the practice already examined in this section. The courts have granted or denied declarations to the same extent that they would grant or deny injunctions. *See, e.g.*, Anderson v. Trimble, 519 P.2d 1352 (Okla. 1974); *see also* Colorado State Bd. v. Rico, 132 Colo. 437, 289 P.2d 162 (1955); Staub v. Baxley, 211 Ga. 1, 83 S.E.2d 606 (1954).

If a prosecution is pending, a declaration would prove as duplicative as an injunction. *E.g.*, Updegraff v. Attorney General, 298 Mich. 48, 298 N.W. 400 (1941); Moresh v. O'Regan, 122 N.J. Eq. 388, 192 A. 831 (1937). *But see* Watson v. Centro Espanal De Tampa, 158 Fla. 796, 30 So.2d 288 (1947). In those jurisdictions that require actual threats of enforcement, the declaration route is an improvement, because it gives relief without the necessity of showing an actual communication by the prosecutor. *See* Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445 (1943).

213. Initially, the federal courts had no statutory authority to release a state prisoner through the device of habeas corpus. Act of Sept. 24, 1789, Ch. 20, § 14, 1 Stat. 81. The federal courts insisted that state courts must not interfere with federal custody of a prisoner. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858). The Civil War and Reconstruction brought statutory authority to grant to state prisoners federal habeas corpus just as broad as that administered by the state courts. For an account of this history, see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

214. 117 U.S. 241 (1886).

215. Unless physically in custody, a defendant could not obtain habeas corpus. At that time, a defendant at large on bail would not meet the custody requirement.

216. Before *Royall*, the lower federal courts had freely granted pretrial habeas corpus to state prisoners. *Ex parte* Ah Lit, 26 F. 512 (D. Or. 1886); *In re* Parrott, 1 F. 481 (C.C.D. Cal. 1880); *Ex parte* McCready, 15 F. Cas. 1345 (C.C.E.D. Va. 1874) (No. 8732).

> the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. . . . The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States.[217]

The discretion to require exhaustion of state remedies became a rule of nonintervention with few exceptions.[218] While an injunction against pending criminal charges would be expected to be unavailable, the breadth of the Court's language also cast doubt on the use of injunctive relief against threatened prosecutions or its use in hybrid situations.[219]

Early cases in the lower federal courts denied the power to enjoin pending state prosecutions,[220] stating the traditional doctrine that a pending prosecution offers an adequate remedy at law and that federal proceedings would duplicate the work of the state courts. Moreover, federal injunctive relief raises special problems for the suitor. Unless diversity jurisdiction is established, the suitor must claim that prosecution is not merely inequitable, but also unconstitutional.[221] Although the Constitution may protect the activity proscribed by the state, the suitor may have difficulty establishing that a trial, which provides a specific opportunity to present this defense, violates constitutional rights.[222] Even if a pending prosecution would be unconstitutional as well as inequitable, the Anti-Injunction Act[223] forbids the stay of a pro-

217. 117 U.S. at 251.

218. *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 889 (1965). There were, however, significant exceptions to the non-intervention rule. Hunter v. Wood, 209 U.S. 205 (1908); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

219. See notes 209-12 & accompanying text *supra*, notes 342-65 & accompanying text *infra*.

220. *E.g.*, Hemsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891); Wagner v. Drake, 31 F. 849 (S.D. Iowa 1887).

221. 42 U.S.C. § 1983 gives a cause of action to redress a deprivation of constitutional rights. It does not grant a right to receive declarations of constitutional rights apart from a finding of deprivation. Nor would the general federal question jurisdictional statute, 28 U.S.C. § 1331 (1976), aid a plaintiff unless he or she could allege the unconstitutionality of a state prosecution. *See* White v. Sparkill Realty Corp., 280 U.S. 500 (1930). *See generally* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

222. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). For a discussion of *Atlantic Coast*, see text accompanying notes 143-45 *supra*.

223. 28 U.S.C. § 2283 (1976).

ceeding pending in a state court.[224]

In *Ex parte Young*,[225] the Court developed an argument for federal "equity jurisdiction" that closely paralleled the state courts' jurisdiction for equitable intervention. In the Court's view, a criminal prosecution was not the best forum for resolving complex factual issues. Moreover, the stringent criminal penalties enacted prevented the plaintiffs from "resorting to the courts for the purpose of determining the validity of such acts,"[226] because no reasonable person would risk criminal prosecution. To deny judicial review would be unconstitutional:

> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.[227]

Until judicial review had occurred, the statute's penal sanction and the threat to enforce it violated due process.[228] In addition, the Court

224. Several cases arising shortly after enactment of Reconstruction legislation denied that these acts authorized an injunction against state court proceedings. *See* Rhodes & Jacobs Mfg. Co. v. New Hampshire, 70 F. 721 (C.C.D.N.H. 1895); Louisiana v. Lagarde, 60 F. 186 (C.C.E.D. La. 1894); Hemsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891); Wagner v. Drake, 31 F. 849 (S.D. Iowa 1887); Louisiana State Lottery Co. v. Fitzpatrick, 15 F. Cas. 970 (C.C.D. La. 1879) (No. 8541); Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408). Although members of the Reconstruction Congress expressed dissatisfaction with state judicial machinery, these objections principally related to the state courts' inability and unwillingness to punish Ku Klux Klan members and sympathizers. *See* Mitchum v. Foster, 407 U.S. 225, 241-43 (1972). In those instances in which legal process was used against citizens deserving protection, removal jurisdiction and habeas corpus were the intended remedies. *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). Habeas corpus had great promise for accomplishing this goal until the Court engrafted its qualification in *Ex parte* Royall, 117 U.S. 241 (1886), and virtually destroyed the utility of habeas.

225. 209 U.S. 123 (1908).

226. 209 U.S. at 144.

227. *Id.* at 147.

228. "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and

stated that a "test case" arising out of a single violation would not be an adequate remedy at law.[229]

The *Ex parte Young* Court did not inquire into the possible availability of state injunctive relief. If a state provides its own injunctive relief, the presence of untested penal legislation should not stifle a plaintiff's proposed conduct. He or she can seek pre-enforcement relief from the state courts. Federal courts have concurrent jurisdiction over deprivations of civil rights, and may not defer to state courts.[230] If state injuntive relief is available, however, the state has not deprived the citizen of pre-enforcement judicial review. Although the Court may have assumed that the Minnesota state court would not provide full equitable relief, especially if the plaintiff were to violate the law after it filed suit,[231] it made no explicit judgments about the quality of state remedies.

The Court did resolve a difficult question. After the federal injunction had been granted,[232] the state attorney general sought manda-

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therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates." 209 U.S. at 147-48.

229. "But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery." *Id.* at 163.

230. *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

231. *See* Milton Dairy Co. v. Great N. Ry., 124 Minn. 239, 144 N.W. 764 (1914). *But see* State v. Chicago, M. & St. P. Ry., 130 Minn. 144, 148, 153 N.W. 320, 321 (1915).

Once the Court granted preliminary relief in *Young*, the Minnesota court cooperated fully with the Supreme Court's review of the legislation. The Minnesota court refused to punish violators of the statute for violations committed during the period of federal review. See notes 239-44 & accompanying text *infra*.

232. Were the plaintiff allowed to gain entrance merely for a declaration of constitutional rights, the analysis could have been cleaner and more persuasive. The plaintiff could dispense with the contention that threatened enforcement was a violation of constitutional rights and concentrate on the proposition that the statute itself was unconstitutional. The plaintiff would have then been required to demonstrate that he or she lacked an adequate *federal* remedy at law. *See* DiGiovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935); Smyth v. Ames, 169 U.S. 466 (1898). The plaintiff could easily satisfy this latter requirement

mus to force the railroads into compliance with state rate laws. Thus, *Ex parte Young* presented a hybrid situation. Although a threat of prosecution under an arguably invalid law may be unconstitutional, the filing of an enforcement action in the state courts arguably is not unconstitutional. A mandamus suit provides for judicial review, while the claim of unconstitutionality had been premised on the absence of review. Rather than suggest that the filing of the mandamus suit was unconstitutional, the Court invoked the rule that the court first seized of the dispositive issues obtained exclusive jurisdiction of the case. As an equal to the state courts, the federal court might retain jurisdiction and exclude interlopers.[233] As the reasonableness of rates had been put in issue in the federal court, that court had the power to forestall consideration of the issue in another court.

The Court further stated that it would not have allowed intervention "in a case where the proceedings were already pending in a state court."[234] This dictum apparently rested on the Court's interpretation of the Anti-Injunction Act.[235] This remark at least forbids intervention in a pending case; it at most forbids any intervention, even of threatened prosecutions, if a prosecution should be pending against the suitor at the time of the federal filing. Under a broad view of duplicative litigation, the first-filed rule would mandate federal deference to the earlier state case. This broad view would reward a perspicacious suitor who, as in *Ex parte Young*, sues before any violations occur and thereby provide the basis of a pending prosecution.[236]

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because, obviously, the plaintiff would not be criminally prosecuted in federal court. Nor would federal habeas corpus be available when a violation had yet to occur.

If the suit had fallen within the Court's diversity jurisdiction, a similar analysis could have been employed. Diversity jurisdiction was not established. 209 U.S. at 143.

233. 209 U.S. at 160; *accord*, Looney v. Eastern Texas R.R., 247 U.S. 214 (1918); Prout v. Starr, 188 U.S. 537 (1903); *In re* Sawyer, 124 U.S. 200 (1888) (dictum).

234. 209 U.S. at 162.

235. The Court cited two cases. In Harkrader v. Wadley, 172 U.S. 148 (1898), the Court refused to intervene in a pending criminal proceeding because the Anti-Injunction Act forbade intervention. *Harkrader* also examined whether the federal proceedings were so related that they ousted the state court's jurisdiction. Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872) did not involve the Act; rather, the Court applied the familiar first-in-time rule as developed in the case law. 209 U.S. at 162.

236. In State v. Chicago, M. & St. P. Ry., 130 Minn. 144, 153 N.W. 320 (1915), the Minnesota Supreme Court emphasized the nature of the right protected and the effect of the relief granted in *Ex parte Young*. After the federal court's injunction had issued, a railroad employee was convicted of violating the rate statute. The Minnesota Supreme Court reversed the conviction and granted the employee an absolute defense for any violations committed during the injunction's term. *Id.* Only offenses committed subsequent to the dissolution of the injunction could be punished. Because the penal provisions had been ruled unconstitutional, at least for the interim, "the effect of the injunction was to suspend

Perhaps the most remarkable aspect of *Ex parte Young* is its continuation of the unquestioned assumption that state and federal courts are fungible. The court neither assumes the superiority of federal courts in the vindication of federal rights, nor discerns a congressional intent that the federal forum be preferred because of its federal nature.[237] Rather, the Court transposes to a federal question case the same principles it had elaborated in diversity cases during the previous century.[238]

In *Ex parte Young*, the lower federal court had enjoined the railroad from charging the rates ordained by state law. The rates eventually were approved,[239] but those who violated the law's prohibitions in the interim received complete immunity for their actions. This immunity illustrates the scope of *Ex parte Young*'s ruling. If the statute were unconstitutional until pre-enforcement review had occurred, violators during this interim period could not be fairly punished.[240] It would be futile to grant pre-enforcement review if the suit's ultimate failure would expose the suitor to the crushing burdens he or she was attempting to avoid through the use of the pre-enforcement review.

The grant of immunity during the injunctive suit is a controversial doctrine. If the law is ultimately found valid, as in *Ex parte Young*, the suitor has engaged in antisocial behavior and has frustrated governmental policy, for which he or she will receive no punishment.[241] For this reason, a bad faith injunctive suit in which the claims are frivolous will not support a grant of immunity.[242] Even if non-frivolous, the claims must be pressed with reasonable dispatch.[243] Finally, an adverse decision on these claims denies immunity for conduct occurring

for the time being the operation of the statute." *Id.* at 150, 153 N.W. at 322; *cf.* Hunter v. Wood, 209 U.S. 205 (1907) (petitioner discharged on habeas corpus).

237. The Court did not set forth the inadequacy of state courts, a line of analysis it would later pursue in Mitchum v. Foster, 407 U.S. 225 (1972). For a discussion of *Mitchum*, see notes 285-89 & accompanying text *infra*.

238. See notes 48-67 & accompanying text *supra*.

239. Minnesota Rate Cases, 230 U.S. 352 (1913).

240. Wadley Southern Ry. v. Georgia, 235 U.S. 651, 669 (1915); Louisville v. N. R.R. v. Railroad Comm'n, 157 F. 944 (C.C.M.D. Ala. 1907); City of Marysville v. Cities Serv. Oil Co., 133 Kan. 692, 3 P.2d 1060 (1931); State v. Chicago, M. & St. P. Ry., 130 Minn. 144, 153 N.W. 320 (1915); Coal & Coke Ry. v. Conley, 67 W. Va. 129, 67 S.E. 613 (1910); Note, *Constitutional Law—Methods of Testing the Constitutionality of Rate Statutes Involving Heavy Penalties*, 26 MICH. L. REV. 415 (1928).

241. *See* Poyer v. Village of Des Plaines, 123 Ill. 111 (1887).

242. *See* State v. Keller, 8 Idaho 699, 70 P. 1051 (1902); Derby Oil Co. v. City of Oxford, 134 Kan. 59, 4 P.2d 435 (1931).

243. *See* Wadley Southern Ry. v. Georgia, 235 U.S. 651, 669 (1915).

during the suitor's appeal to a higher court.[244] Hedged with these limitations, immunity provides the only meaningful protection for a citizen who desires to challenge a law that puts him or her in an unfair dilemma.

Ex parte Young could have been limited to its facts. The Court stressed two distinctive factors: (1) the penalties, even for a single violation, were severe; and (2) the constitutional challenge to the substantive provisions of the statute depended on factual analysis more suitable for equity proceedings than for trial by jury.[245] Later cases, however, agreed that the prospect of criminal proceedings, not the specific penalties involved, presented the suitor with an unconstitutional dilemma: a choice between the criminal process and valuable rights.[246] Moreover, a challenge to a law need not require the special fact-finding ability of a chancellor. Later cases granted injunctive relief on an examination of clear-cut legal issues in no way dependent upon factual analysis.[247]

Cline v. Frink Dairy Co.,[248] a 1927 case, is the zenith of federal intervention in state criminal proceedings. The state district attorney had filed an information in state court against the plaintiff, and a state grand jury was considering additional indictments. The prosecutor also threatened additional suits, including a suit for forfeiture of a corporate franchise. The lower federal court enjoined all state proceedings, both pending and threatened. The Court, quoting its dictum in *Ex parte Young*, disapproved the injunction as applied to the pending prosecution.[249] As applied to the threatened prosecutions, however, it held that the plaintiff had no adequate remedy at law and deserved the prompt intervention of equity.[250] The Court then proceeded to the merits and held the state penal statute unconstitutional.[251] Although the district attorney was not enjoined from prosecuting the pending proceeding, he would, if prudent, disengage himself from a prosecution destined to fail.[252]

Frink Dairy illustrates the ambiguity in the doctrine that when one

244. *See id.*
245. 209 U.S. at 163-66.
246. *See* Terrace v. Thompson, 263 U.S. 197 (1923); Truax v. Raich, 239 U.S. 33 (1915).
247. Terrace v. Thompson, 263 U.S. 197 (1923).
248. 274 U.S. 445 (1927).
249. *Id.* at 453.
250. *Id.*
251. *Id.* at 465.
252. Were he to continue, an injunction might later be permissible. *See* Weed & Co. v. Lockwood, 255 U.S. 104 (1921).

court has jurisdiction of a case, another court may not intervene. The criminal case and the equity suit are not identical, but the crucial issues may be identical. In *Ex parte Young*, the Court held that identity of crucial issues would give the court first seized of those issues exclusive jurisdiction. The *Frink* Court held that only strict identity of the cause of action would give exclusive jurisdiction. This inconsistency suggests that federal courts regarded equitable relief as the better vehicle for testing the application of criminal legislation to prospective or continuing conduct.

The Court's analysis in *Ex parte Young* suggests that a pending prosecution is an inadequate remedy for the dilemma created by threatened prosecution. If a single test case, as in *Ex parte Young*, would not relieve the suitor from his or her dilemma, the priority of a single case in *Frink Dairy*, perhaps even one to be treated as a test case, does not necessarily dispel the dilemma.

Dictum in *Douglas v. City of Jeannette*[253] provided the basis for *Younger*'s eventual departure from the *Ex parte Young* tradition. In *Douglas*, the plaintiffs, Jehovah's Witnesses, attacked a city ordinance that limited their proselytizing. The Court had invalidated the ordinance in a companion case arising out of a state criminal conviction,[254] but also refused to issue an injunction.

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. . . . Where the threatened prosecution is by state officers for alleged violations of a state law, . . . the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury "both great and immediate."[255]

Notwithstanding its broad disapproval of federal equitable intervention, including threatened prosecutions, the Court remarked that "we find no ground for supposing that the intervention of a federal court . . . will be either necessary or appropriate."[256]

253. 319 U.S. 157 (1943).

254. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

255. 319 U.S. at 163-64.

256. *Id.* at 165. Had the Court desired to make a complete statement of the law, it might have mentioned the consequences of the state's failure to dismiss its prosecutions. As noted earlier, continued prosecution after a declaration of invalidity warrants equitable interven-

In the period between *Douglas* and *Younger*, the Court maintained the analytic framework developed in *Ex parte Young*; it continued to grant injunctive relief against threatened state prosecutions,[257] particularly in the context of state efforts to maintain racial segregation.[258] *Dombrowski v. Pfister*,[259] a 1965 decision, illustrates this pattern.[260] The plaintiffs in *Dombrowski* were threatened with prosecutions for failing to register as members of a "Communist-front organization" and for holding office in a "subversive organization."[261] The plaintiffs asserted that the statutory definitions of these two classes of organizations were overbroad because they lumped together protected and unprotected activities. The plaintiffs also asserted that even if the statutes were constitutional, they did not apply to the plaintiffs because the plaintiffs had not engaged in unprotected conduct. The plaintiffs denied any attempt to overthrow the government in Louisiana. The defendants were threatening legally and factually unsupportable charges to frustrate the plaintiffs' attempts to register to vote. The lower court denied injunctive relief to test these allegations.[262] Plaintiffs were then indicted.

The Court reversed the denial of an injunction, but failed to formulate a clear doctrine. The Court found no bar in the Anti-Injunction Act; because the federal suit had been filed first, a federal injunction could issue after the institution of criminal proceedings.[263] The Court

tion, a doctrine affirmed by the Court in an earlier case. *See* Weed & Co. v. Lockwood, 255 U.S. 104 (1921). The Court's decision allowed the state freedom to do its duty on the assumption that it would do its duty. *See* Dombrowski v. Pfister, 380 U.S. 479, 485 (1965). There was no indication that the prosecutor would continue his efforts once the statute had been invalidated.

257. Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 645-59 (1979), assembles a massive collection of cases that granted federal injunctive relief, notwithstanding *Douglas*.

258. *E.g.*, Gremillion v. United States, 368 U.S. 11 (1961), *aff'g* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La.); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Faubus v. Aaron, 361 U.S. 197 (1959), *aff'g* Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.); Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala.); Brown v. Board of Education, 347 U.S. 383 (1954).

259. 380 U.S. 479 (1965).

260. Justice Black attempted to distinguish *Dombrowski* by interpreting it as approving equitable relief only because the defendants were acting in bad faith. 401 U.S. at 48-49. In *Dombrowski*, however, the Court enjoined because the statutes were overbroad. The Court employed a bad faith analysis to reject an alternative argument that it should have abstained under *Pullman*. 380 U.S. at 490.

261. 380 U.S. at 493.

262. 227 F. Supp. 556 (E.D. La. 1964).

263. 380 U.S. at 484 n.2. In this respect, the Court followed two basic themes from *Ex parte Young*: (1) a plaintiff has the freedom to choose either forum; and (2) the federal forum, when chosen, may then protect its jurisdiction. Even if the Court had not wished to

conceded, however, that *Douglas*[264] had ushered in a new era in which federal courts would assume that state courts and state prosecutors would uphold the Constitution. To overcome this assumption, the Court advanced the argument that state court resolution of overbreadth cases would be inadequate. No single prosecution, even if brought in good faith, would delimit the statute, and the statute would continue to chill first amendment rights until it had been fully interpreted.[265]

This analysis has a major defect. The *Douglas* assumption about the ability of state courts should have led the Court to inquire into the availability of injunctive and declaratory relief in the state courts. As did *Ex parte Young, Dombrowski* ignored this important question. The Court should have treated *Douglas* as the exceptional case that it is. The *Dombrowski* plaintiffs argued that the statute was unconstitutional until it had been construed and approved. Criminal prosecutions provided an inadequate review. Until the statute had been approved, no prosecutions could issue; even after it had been approved, if at all, no punishments could be meted out for conduct during this review period.[266] State injunctive remedies were not even considered. If the Court had tied itself to the *Ex parte Young* tradition, its grant of relief would have made no implicit judgments about the quality of state court justice.[267]

The federal cases have granted broad equitable relief, even at the expense of a coherent approach to duplicative litigation. Only direct interference with an already pending prosecution was forbidden. The federal courts did not adjudge the state courts incompetent to decide these cases.[268] Threatened prosecutions were freely enjoined, however, even when pending prosecutions, which provided an opportunity for resolution of the legal issues, had been lodged against the suitor in the interim. This approach treated criminal proceedings realistically, ac-

rely on this doctrine, it could have granted relief against further threatened prosecutions, as it had in *Frink Dairy*. 247 U.S. 445 (1927). For a discussion of *Frink Dairy*, see text accompanying note 248 *supra*.

264. 319 U.S. 157 (1943).

265. 380 U.S. at 486-87.

266. *Dombrowski* approved prosecution for unprotected conduct occurring during judicial review, so long as the statute gave fair warning of the criminality of the conduct later determined to be unprotected. 380 U.S. at 491 n.7. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967). Because in the *Dombrowski* context unprotected conduct would probably be of a violent nature, the Court's remarks are not at odds with the *Young* tradition discussed in the text accompanying notes 239-44 *supra*.

267. See text accompanying note 233 *supra*. Justice Harlan severely criticized the *Dombrowski* majority for its assumptions about the quality of state court justice. 380 U.S. at 499.

268. *Cf.* Porter v. Lee, 328 U.S. 246 (1946) (federal injunctive relief effectively supplanted state court determination of a factual issue relevant to a federal law issue).

knowledging that they may not give a quick, authoritative resolution of important legal issues. It also reflected tolerance for the suitor's freedom to select a federal forum. State jurisdiction was concurrent and hence entitled to no special preference. This framework avoided divisive judgments about the quality of state court justice.

Younger v. Harris

In *Younger v. Harris*,[269] the Court made the most of *Dombrowski*'s hesitancy to grant relief and further trimmed the reach of federal injunctive relief. In *Younger*, California state authorities indicted Harris for a violation of the California Criminal Syndicalism Act[270] because he had publicly distributed certain offensive leaflets. He asserted that the act violated first and fourteenth amendment rights and inhibited him in their exercise. The state trial court denied his motion to dismiss the indictment on these grounds, and the state reviewing courts denied his requests for an interlocutory writ of prohibition. Harris then sought injunctive relief in the federal district court. Additional unindicted plaintiffs joined in Harris' suit because they insisted that the existence of the statute threatened their exercise of free speech rights, even though they had received no direct threats from police or prosecutorial authorities. Although the United States Supreme Court had once upheld the constitutionality of the challeged statute,[271] the three-judge district court interpreted later precedent[272] as undermining the ruling and declared the statute unconstitutional.[273]

The district court's opinion was ultimately reversed by the United States Supreme Court.[274] The Court summarily rejected the arguments

269. 401 U.S. 37 (1971).

270. CAL. PENAL CODE §§ 11400-11402 (West 1970 & Supp. 1970-1979). Section 11401 declares a felony any act of advocating, teaching, or verbally justifying criminal syndicalism or the use of crime, sabotage, violence, or any unlawful method of terrorism as a means of accomplishing political or industrial change; knowingly becoming a member of an organization whose purpose is to advocate or aid criminal syndicalism; and any act of organizing or committing acts advocated or taught by the doctrine of criminal syndicalism.

271. Whitney v. California, 274 U.S. 357 (1927) held that the Act was not unduly vague and uncertain in its application.

272. The district court noted the development of constitutional concepts of freedom of expression in the cases of Baggett v. Bullitt, 377 U.S. 360 (1964) and NAACP v. Button, 371 U.S. 415 (1963). 281 F. Supp. at 511-12. The district court also recognized the applicability of the rule established by Dombrowski v. Pfister, 380 U.S. 479 (1965), that a penal statute susceptible of sweeping and improper application must be considered as a whole, irrespective of its limited applicablity to the parties challenging it.

273. Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968).

274. Younger v. Harris, 401 U.S. 37 (1971). After his defeat in the United States Supreme Court, Harris petitioned the California state courts for pretrial habeas corpus. In

of the unindicted plaintiffs. Because they had made no charge of actual threats of prosecution, they did not present a genuine controversy. Their "imaginary or speculative" fears of state prosecution did not qualify them as appropriate plaintiffs in a federal lawsuit seeking to stop the prosecution in state court of another individual.[275]

Regarding Harris' contention, Justice Black, writing for the majority, noted that federal courts traditionally have refused to enjoin pending state prosecutions.[276] In part, this deference to state criminal proceedings reflected equity's desire to preserve the jury trial, a major component of a criminal case, as well as to avoid "duplication of legal proceedings . . . where a single suit would be adequate to protect the rights asserted."[277] More importantly, the deference rested upon its definition of federalism as

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[278]

Thus, an indicted person who seeks a decree that will bar his or her being brought to trial must allege that further proceedings in criminal court would cause not only irreparable harm, the traditional pre-

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the interim, Brandenburg v. Ohio, 395 U.S. 444 (1969), invalidated an Ohio statute and overruled the Court's earlier decision upholding the California statute, Whitney v. California, 274 U.S. 357 (1927). Accordingly, the California court, considering itself bound by *Brandenburg*, granted habeas corpus and terminated the prosecution. *In re* Harris, 20 Cal. App. 3d 632, 97 Cal. Rptr. 844 (1971).

275. 401 U.S. at 42. This branch of *Younger* is sufficiently elastic that it might frequently bar relief when no prosecution is pending. *See* Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 708-10 (1981).

276. "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: '[N]or shall a writ of injunction be granted to stay proceedings in any court of a state. . . .' 1 Stat. 335, ch. 22, § 5. A comparison of the 1793 Act with 28 U.S.C. § 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of the old Act. During all this lapse of years from 1793 to 1970, the statutory exceptions to the 1793 congressional enactment have been only three: (1) 'except as expressly authorized by Act of Congress'; (2) 'where necessary in aid of its jurisdiction'; and (3) 'to protect or effectuate its judgments.' In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages." 401 U.S. at 43 (citing *Ex parte* Young, 209 U.S. 123 (1908)). The Court found further support for this congressional policy in Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941). 401 U.S. at 43 n.3.

277. *Id.* at 44.

278. *Id.*

requisite for equitable relief, but also harm "both great and immediate."[279] Only rarely can this standard be met; defense of a single criminal proceeding usually does not create irreparable injury.[280] To forestall a rapid dismissal of the plea for injunctive relief, a plaintiff must allege that the prosecutor has proceeded against him or her in bad faith and for the purpose of harassment, with no "expectation of securing valid convictions"[281] or that the statute is "flagrantly and patently" violative of the Constitution "in every clause, sentence, and paragraph."[282] This standard, however, is not met by the assertion that a statute is void for vagueness or overbreadth. A limiting construction might leave certain "hard core" conduct properly proscribed. Therefore, the exception applying to a flagrantly illegal statute, by definition, cannot come into play when a statute is attacked for vagueness or overbreadth. Thus, both history and policy precluded federal intervention in a pending prosecution, except in a most exceptional situation.[283]

If the *Younger* Court had limited its holding to the context of a single pending indictment and a citizen who does not wish to pursue a course of conduct, the decision would be clearly correct, although it would not be as important. Justice Black's reference to "Our Federalism," however, referred to a broader picture, placing in doubt all injunctive and declaratory relief against state penal laws.

279. *Id.* at 46 (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926)).

Professor Field has correctly noted that a federal Court's inquiry into the impropriety of equitable relief historically has focused on the availability of federal, not state, remedies at law. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 705-06 (1981).

280. "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not be by themselves considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

281. *Id.* at 48 (quoting Dombrowski v. Pfister, 380 U.S. 479, 482 (1965)).

282. 401 U.S. at 53 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

283. Although the *Younger* Court cautioned against a "blind deference to 'States' rights," 401 U.S. at 44, the highly restrictive language used to describe the rare circumstances in which an injunction might issue suggests that federal courts should not enjoin state prosecutions that may be obvious constitutional violations. On other occasions, the Court has proceeded further in general disapproval of federal equitable intervention in local proceedings. In Rizzo v. Goode, 423 U.S. 362 (1976), in response to plaintiffs' complaint of systematic police brutality directed at members of minority groups, the Supreme Court, stating that a local government should be granted "the widest latitude in the 'dispatch of its own internal affairs,'" *id.* at 378-79 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961)), reversed the lower court judgment that had incorporated a comprehensive program for improving the handling of citizen complaints alleging police misconduct. It held that the lower court had improperly "injected itself by injunctive decree into the internal disciplinary affairs," 423 U.S. at 380, of a city police department.

The Court's high regard for and deference to state institutions,[284] including state courts, is particularly hard to evaluate when one considers its subsequent decision in *Mitchum v. Foster*.[285] In *Younger*, the Court refused to consider whether the Anti-Injunction Act barred relief, and declared relief inappropriate because of its regard for state institutions.[286] In *Mitchum*, by contrast, the Court specifically ruled that civil rights injunctions were not barred by the terms of the Anti-Injunction Act.[287] It recounted legislative history evidencing deep congressional suspicion of the competence and fairness of state courts. The Congress, reasoned the Court, surely intended to grant the federal courts power to enjoin state court proceedings that deny federal civil rights. The Court did not explain how or under what circumstances it could substitute a high regard for state courts, which Congress had held in low regard.[288] Nor did it explain how *Ex parte Young* had failed to discover the legislative history on which *Mitchum* had relied.[289]

Injunctions Against Pending Criminal Actions

The Court generally has maintained its traditional refusal to enjoin previously instituted criminal charges. Defense of those charges normally will give the citizen complete relief. The expense and anxiety resulting from a defense of criminal charges are inevitable. The alternative of injunctive relief brings unacceptable social costs. These considerations come into play regardless of whether the criminal proceeding is state or federal in nature.[290]

Younger itself departed from traditional doctrine in allowing the possibility that injunctions may sometimes issue against prior-filed criminal charges.[291] As the criminal defendant's proper remedy will

284. *See* Younger v. Harris, 401 U.S. 37, 44 (1971); Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965).

285. 407 U.S. 225 (1972).

286. 401 U.S. at 54.

287. 407 U.S. at 242-43.

288. "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Id.* at 242.

289. *Ex Parte Young* had explicitly stated that an injunction may not issue against already pending state proceedings, 209 U.S. at 162, although the Court did not identify the source of this prohibition.

290. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975) (refusal to enjoin court-martial).

291. *Ex parte Young* ruled out this possibility. 209 U.S. at 161; *accord*, Cline v. Frink Dairy Co., 274 U.S. 445 (1927). See text accompanying note 248 *supra*. Shortly after

often be pretrial habeas corpus, the scope of injunctive relief is relatively narrow. Injunctive relief will be unavailable when the suitor seeks release from custody;[292] instead, he or she must seek habeas corpus, which requires exhaustion of available state remedies.[293] The Court's broad definition of "custody"[294] further narrows the availability of injunctive relief. Thus, a criminal defendant can hope, at best, for injunctive relief when he or she claims that state proceedings deny constitutional rights and the defendant desires to restructure those proceedings, rather than to terminate them or to gain release from custody.[295]

Exhaustion of State Remedies

These narrow limits are illustrated in *Gerstein v. Pugh*.[296] The plaintiffs were being held to await trial on informations filed by the district attorney. They alleged a deprivation of their liberty without due process because no judicial officer had ever made a finding of

Younger, however, the Court decided in Mitchum v. Foster, 407 U.S. 225 (1972), that injunctions under the Civil Rights Act are an expressly authorized exception to the Anti-Injunction Act. This position had been rejected in prior cases. See note 224 *supra*. One modern case had accepted the view that 42 U.S.C. § 1983 is an exception to the Anti-Injunction Act. Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950). *Contra*, Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

In *Mitchum*, the Court interpreted the legislative history underlyling the Reconstruction enactments to evince a strong distrust of the state judiciary in civil rights cases. Because of its distrust, Congress granted equitable remedies that could extend even to pending state judicial proceedings.

292. Preiser v. Rodriguez, 411 U.S. 475 (1973). Thus, double jeopardy claims have been heard in pretrial habeas corpus. *E.g.*, Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979); Fain v. Duff, 488 F.2d 218 (5th Cir. 1973).

293. *Ex parte* Royall, 117 U.S. 241 (1886). Once a prisoner exhausts his or her state remedies, he or she generally may relitigate the constitutional claims in a federal habeas proceeding. *See* Preiser v. Rodriguez, 411 U.S. 475, 497-98 (1973).

294. *See* Mitchum v. Foster, 407 U.S. at 298-99; *see also* Hensley v. Municipal Court, 411 U.S. 345 (1973).

295. The most frequent type of case appears to be a request for the appointment or allowance of counsel. These cases have not been successful because the state appellate process can always hear a denial-of-counsel claim and reverse a conviction, if warranted. Gibson v. Jackson, 578 F.2d 1045 (5th Cir. 1978); Williams v. Rubiera, 539 F.2d 470 (5th Cir. 1976); Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

When a lawyer has asserted a right to represent the client, the federal courts have considered his or her arguments on the merits. Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978); Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), *rev'd and remanded*, 439 U.S. 439 (1979) (denying the asserted right on the merits). It is unclear, after *Flynt*, whether a lawyer has any federal right to appear *pro hac vice* in a foreign forum. In any event, the Court's disposition on the merits, especially when the state officials pressed a *Younger* objection, supports this author's analysis of *Younger*. 439 U.S. at 438 n.1.

296. 420 U.S. 103 (1975).

probable cause. The prisoners sought not release, but mandatory preliminary hearings.[297] The Court was willing to consider their arguments on the merits, dismissing in a footnote a *Younger* objection. "The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution."[298] The plaintiffs were not asking the federal court to abort their trial, but their entitlement to relief depended on the Court's acceptance of the debatable proposition that the prisoners were suffering a violation of constitutional rights and that defense of the pending charges provided no remedy.[299]

The Court's terse discussion does not illuminate the extent of its holding. The prisoners had state remedies to secure their pretrial release, but neither remedy was of practical significance. First, one of the prisoners had a right to release on bail, but had insufficient cash to meet the bail set for him. Second, Florida courts could grant pretrial habeas corpus "under exceptional circumstances,"[300] but because Florida courts seldom granted a writ of habeas corpus, the Court evidently regarded this remedy to have no significance, even though neither prisoner had applied for habeas corpus relief. *Gerstein*, then, allowed injunctive relief because state courts were highly unlikely to remedy the constitutional violation.[301]

297. Otherwise, they would have been required to exhaust state court remedies and seek habeas corpus. *Id.* at 107 n.6. See text accompanying notes 292-93 *supra*.

298. 420 U.S. at 108 n.9; *accord*, Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981); Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978).

299. The Court did not consider whether the Florida courts would reverse a conviction for denial of a preliminary hearing. Some states have granted such a remedy. State v. Juarez, 5 Ariz. App. 431, 427 P.2d 565 (1967); People v. Bucher, 175 Cal. App. 2d 343, 346 P.2d 202 (1959); State *ex rel.* Klinkiewicz v. Duffy, 35 Wis. 2d 369, 151 N.W.2d 63 (1967).

In Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973), the plaintiff pleaded guilty and was placed on probation, restitution to his victim being a condition of probation. He complained that the amount of the restitution had been determined in an unconstitutional manner after his conviction. Because state law provided no procedural device to raise his objection, the court approved injunctive relief and regarded *Younger* to be no obstacle.

300. 420 U.S. at 106.

301. Even for habeas corpus, the prisoner need not exhaust futile remedies. *See, e.g.*, Marino v. Ragen, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring). It is unclear to what extent the habeas cases on futility will influence the sort of decision made in *Gerstein*. If the standard for bypassing state remedies is the same in injunction cases and in habeas cases, then the prisoners acted too cautiously in not seeking outright release. It appears, however, that the Court approved their caution, 420 U.S. at 107 n.6, and that therefore the two standards are different, although the difference is not clear.

If the state courts have previously rejected the argument now put forth by the federal plaintiff, the federal court may grant equitable relief. *See* Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Fain v. Duff, 488 F.2d 218 (5th Cir. 1973); GI Distributors v. Murphy, 336 F.

The Court could have required the plaintiffs to exhaust their state remedies and seek Supreme Court review of an adverse decision.[302] Exhaustion of state remedies would have been required had the prisoners sought even a conditional release through the device of federal pretrial habeas corpus.[303] Rather than hold to formal requirements, however, the *Gerstein* Court took a realistic view of the claimed deprivation of constitutional rights. A rigorous exhaustion requirement would merely extend the period of illegal detention. The Court found state remedies to be of no practical significance.[304]

The Court has restrained the application of *Gerstein*. If state remedies are available, the Court often will find those remedies efficacious. For example, in *O'Shea v. Littleton*,[305] the plaintiff class charged that state judges arbitrarily set the amounts of cash bonds, sentenced blacks more harshly than whites, and denied jury trials in misdemeanor trials. In reversing a grant of equitable relief, the Court declared that no actual case or controversy existed, because no class representative was awaiting trial. In dictum, the Court opined that injunctive relief would be unavailable even to someone awaiting trial. State law provided remedies to review the asserted deprivations of constitutional rights. Implicitly, the Court found that the state remedies were not hopeless, as they had been in *Gerstein*.[306]

The Court more consciously appraised state remedies in *Kugler v. Helfant*,[307] in which it also denied equitable relief. Defendant Helfant sought an injunction, alleging that he could not obtain a fair trial when his defense promised to charge members of the New Jersey Supreme Court with improper conduct in securing his testimony before a grand jury. The Third Circuit found federal relief appropriate because of the special circumstances of the case.[308] The Supreme Court agreed that if "'extraordinary circumstances' render the state court incapable of

Supp. 1036 (S.D.N.Y. 1972). *But see* Karp v. Collins, 333 F. Supp. 15 (D.N.J. 1971) (three-judge court). If the state court might be expected to change its mind, perhaps the plaintiff must resort to state court. *See* Glenn v. Askew, 513 F.2d 61 (5th Cir. 1975).

302. This analysis was used by the Court in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). See text accompanying note 143 *supra*.

303. See text accompanying notes 292-93 *supra*.

304. The Court thus ignored its decision in *Atlantic Coast*, 398 U.S. 281 (1970).

305. 414 U.S. 488 (1974). *See* J.P. v. De Santi, 653 F.2d 1080 (6th Cir. 1981). *But see* Lyons v. City of Los Angeles, 615 F.2d 1243 (9th Cir. 1980).

306. *See* 414 U.S. at 502; *accord*, Bonner v. Circuit Court, 526 F.2d 1331 (8th Cir. 1975); King v. Jones, 450 F.2d 478 (6th Cir. 1971).

307. 421 U.S. 117 (1975).

308. *Younger* had left open the possibility that the federal courts have an undefined power to enjoin in special circumstances. 401 U.S. 37, 54 (1971).

fairly and fully adjudicating the federal issues before it,"[309] federal relief would be appropriate. The Court concluded, however, that the objectivity of the entire New Jersey court system had not been "irretrievably impaired,"[310] and denied relief. The Court's conclusion rested on the plaintiff's statutory right to challenge for cause any trial judge prejudiced against him. Moreover, he had the prospect of an impartial appellate court. Most of the state supreme court judges involved had left the bench; under New Jersey law, those remaining would be obliged to recuse themselves if Helfant's case came before them on appeal. The Court did not rule that Helfant would in fact receive a fair, unbiased state trial, but implied that federal relief will be denied whenever a state provides a reasonably effective mechanism to blunt bias.[311]

The delicate judgments required by *Gerstein* and *Kugler* are illustrated in *New Jersey v. Chesimard*,[312] a Third Circuit decision. Chesimard was being tried in state court for murder and related offenses. An orthodox Muslim, she requested that her trial not take place on Fridays, her religion's Sabbath. When the trial judge and the Appellate Division of the New Jersey Superior Court refused her request, Chesimard sought federal injunctive relief. The Third Circuit denied relief because she had not fully employed her state appellate remedies.[313] The state proceedings did not deny her constitutional rights because, in the Third Circuit's estimation, the state supreme court would have given her a reasonably quick decision and would have had an open mind on her freedom of religion claim.[314]

Chesimard raises a difficult question. If someone in Chesimard's position is denied relief by the state supreme court, perhaps only the United States Supreme Court may review that disposition. Collateral

309. 421 U.S. at 124.

310. *Id.* at 127.

311. *See id.* at 130-31. By contrast, in Gibson v. Berryhill, 411 U.S. 564 (1973), the Court found a disqualifying conflict of interest among the members of an administrative board; provision for an appeal of the board's decision was not thought sufficient to avoid a constitutional defect in the board's composition. An adverse board decision would create irreparable injury, which not even an appeal could remedy. Perhaps, if the board's procedures had allowed a pre-hearing challenge for cause, the Court would have reached a contrary result.

312. 555 F.2d 63 (3d Cir. 1977) (en banc).

313. The Third Circuit stressed that it was denying relief because Chesimard had not exhausted her remedies. The court refused to say whether there would be a constitutional right to interlocutory review had New Jersey provided no remedies. 555 F.2d at 67.

314. The Third Circuit noted a previous decision of the New Jersey court upholding the religious claims of Black Muslims, Holden v. Board of Education, 46 N.J. 281, 216 A.2d 387 (1966).

review in the district court, formally presented as a suit for injunctive relief, might be denied.[315] On the other hand, collateral relief in the form of federal habeas corpus would be available even after an exhaustion of remedies.[316] Habeas corpus, however, would not give the relief sought in *Chesimard* or in *Gerstein* because the plaintiffs were not seeking releases from custody. There is no reason to bar injunctive relief for one in Chesimard's position when a prisoner in a *Gerstein* case need not even exhaust state remedies. If dim prospects of state relief permit federal intervention, as in *Gerstein*,[317] the actual denial of state relief should make federal relief equally available.[318]

Bad Faith Theory

The Fifth Circuit has granted even broader relief against pending prosecutions, employing the "bad faith" theory approved but insufficiently defined in *Younger*.[319] In *Wilson v. Thompson*,[320] the plaintiffs had been arrested for scuffling with sheriff's deputies, but the charges were eventually dismissed.[321] When the plaintiffs filed civil actions against the deputies, the criminal charges were reinstituted. The Fifth Circuit approved injunctive relief in principle if the plaintiffs were able to prove that the criminal charges were brought to retaliate against them for bringing the civil suit and to deter them from seeking judicial redress.[322] The court summarily rejected the proposition that only multiple prosecutions could evidence sufficient "bad faith" to avoid *Younger*. The Fifth Circuit held that a retaliatory prosecution violates constitutional rights. To defend such a prosecution through the normal

315. The Third Circuit also refused to decide this question. 555 F.2d at 67. Collateral review was so denied in *Lektro-Vend*, 433 U.S. 623 (1977). See text accompanying note 157 *supra*.

316. See note 293 *supra*.

317. See text accompanying notes 300-01 *supra*.

318. See text accompanying notes 355-62 *infra*. *See also* Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859 (1976). It is unclear how the Court's recent decision in Allen v. McCurry, 499 U.S. 90 (1981), would dispose of Ms. Chesimard's case.

319. *See* 401 U.S. at 48-49; Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1115-16, 1116 n.36 (1977).

320. 593 F.2d 1375 (5th Cir. 1979).

321. On remand, relief was denied for a failure of proof. 638 F.2d 799 (5th Cir. 1981). *See also* Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981); Munson v. Gilliam, 543 F.2d 48 (8th Cir. 1976); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Canal Theaters Inc. v. Murphy, 473 F.2d 4 (2d Cir. 1973); Duncan v. Perez, 445 F.2d 557 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), *aff'd*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

322. Whether the Constitution forbids re-institution of criminal charges to retaliate for a civil suit is a debatable issue. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

course of trial and appeal prolongs the violation of constitutional rights. As the criminal proceeding did not provide an adequate remedy, a federal injunction might issue.[323]

Wilson v. Thompson has made explicit what *Gerstein* and *Helfant* have suggested: sometimes judicial proceedings in themselves may deny constitutional rights. In the ordinary case, an individual may complain about the constitutionality of a penal statute, and the normal course of trial and appeal preserves his or her constitutional rights. When, however, the process denies constitutional rights, injunctive relief may be necessary to prevent irreparable loss. In cases such as *Wilson*, courts have made no inquiry into the availability of state injunctive relief,[324] and should examine whether state remedies might prevent irreparable injury.

Wilson v. Thompson went beyond *Gerstein* in two respects. First, *Wilson* aborted the state criminal proceedings. The Court may not approve an injunction that completely halts criminal proceedings.[325] In applying *Gerstein*, a number of lower courts have stressed that the *Gerstein* plaintiffs were not trying to avoid a state trial.[326] Second, the Fifth Circuit has attempted the resolution of difficult factual questions concerning motivation. Traditionally, equity has avoided such a task.[327] In *Gerstein*, the federal injunction merely mandated that probable cause hearings be conducted by the state courts; the federal court did not decide probable cause for each prisoner.

Injunctions against Threatened Criminal Actions

When no criminal proceedings are pending, the Court has, for the most part, maintained the traditional commitment to equitable intervention. *Younger* broadly implied that this type of relief might no longer be forthcoming.[328] The Supreme Court dispelled these implica-

323. *Accord*, City of Ashland v. Heck's, Inc., 407 S.W.2d 421 (Ky. 1966); S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

324. The cases cited in note 322 *supra*, indicate that state relief might be available in such a situation.

325. Habeas corpus would seem to be the more appropriate remedy, and habeas requires the exhaustion of state remedies. See text accompanying notes 292-93 *supra*.

326. *E.g.*, Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973).

327. See text accompanying note 205 *supra*. But see note 322 *supra*.

328. See the quotation in text accompanying note 278 *supra*. The Fifth Circuit complied with this implication. Other circuits disagreed and granted relief, so long as no prosecution was pending. *E.g.*, Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971).

tions in reviewing the Fifth Circuit's decision in *Steffel v. Thompson*:[329]

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention . . . be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. . . . A [federal] refusal . . . to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity . . . .[330]

In upholding a grant of declaratory relief, *Steffel* reasoned that such relief was "less intrusive"[331] than an injunction, suggesting that an injunction might be impermissible in some instances in which a declaration would be permissible.[332] Because the plaintiff in *Steffel* was seeking only a declaration, the Court's remarks are dictum. Later cases, particularly *Wooley v. Maynard*,[333] have established that a plaintiff may obtain an injunction if there is a threat of repeated prosecution.[334] The Court often grants pre-enforcement relief without even mentioning the *Younger* doctrine.[335]

The Court has had difficulty in setting limits upon intervention in threatened criminal proceedings. Its inattention to traditional equity practice has led to one radical intrusion. In *Allee v. Medrano*,[336] the plaintiffs, organizers of a strike by farm workers, obtained injunctive relief against state police officials. The lower court had found that the state officials had "taken sides"[337] in a labor-management controversy and had used their authority to suppress the plaintiffs' efforts to organ-

329. 415 U.S. 452 (1974).

330. *Id.* at 462.

331. *Id.* at 469.

332. Cases interpreting the Uniform Declaratory Judgments Act have rejected this view. See note 212 & accompanying text *supra*. If, however, one accepts that Douglas v. Jeannette, 319 U.S. 157 (1943), *discussed in* text accompanying notes 253-56 *supra*, normally forbids federal equitable intervention, the declaratory judgment offers a difference in form of remedy to rationalize federal relief. *See* Zwickler v. Koota, 389 U.S. 241 (1967).

Had the Court in *Steffel* been concerned about preserving the autonomy of state government, it would have inquired into available state remedies. Most states would grant the declaratory or injunctive relief that federal courts are willing to supply. See notes 184-91 & accompanying text *supra*.

333. 430 U.S. 705 (1977).

334. *See id.* at 712 (court distinguished between first-time threatened prosecution and the threat of repeated prosecutions in the future, several successive prosecutions having already been undertaken against the same defendants).

335. *E.g.*, Village of Schaumberg v. Citizens for a Better Environment, 445 U.S. 972 (1980).

336. 416 U.S. 802 (1974).

337. *Id.* at 808.

ize a strike. The lower court invalidated a number of statutes that had formed the bases for some of the arrests. The court further enjoined arrests for violations of a valid statute unless the defendants should have adequate cause to make an arrest for a violation. The Supreme Court upheld the grant of injunctive relief.[338]

Unjustified arrests for alleged violations of valid statutes can discourage the plaintiffs' first amendment rights. Although the arrests may violate first amendment rights as well as fourth amendment rights, the propriety of a remedy is a different and more difficult question. When there is no attack on the statute itself, equity has traditionally avoided an injunction directing police officials to arrest on probable cause.[339] *Allee* may be another example of equity's flexibility: if the inequity is clear, relief will issue notwithstanding institutional restraints.

In *Rizzo v. Goode*,[340] the Court proceeded in a different direction. The plaintiffs had established to the satisfaction of the lower courts a pattern of police misbehavior—illegal arrests, searches, and seizures, as well as police brutality. They challenged no substantive penal law upon which the arrests, searches, and seizures had been based. The lower courts had ordered the writing of departmental guidelines to lower the incidence of such conduct. In effect, these guidelines would have formed a comprehensive, detailed injunction requiring the police not to violate constitutional rights. The Court reversed, noting that the alleged pattern had not been sufficiently established.[341] The Court declared, however, that the federal courts should not inject themselves

338. *Allee* seems to conflict with dictum in O'Shea v. Littleton, 414 U.S. 488 (1974), decided only shortly before *Allee*. The Court in *O'Shea* disapproved an injunction that would have required the setting of reasonable amounts for cash bonds, uninfluenced by the alleged racial prejudice of the defendant judges. The Court stressed the difficulties in enforcing compliance. Every state defendant dissatisfied with a judge's bond decision would be able to institute federal contempt proceedings, including appeals. *Id.* at 502.

339. Instead, a suit for damages has been considered the only appropriate civil judicial remedy for breach of the probable cause standard. Even the Fifth Circuit's decision in Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979), did not go so far, but only enjoined a single prosecution. Difficult factual issues would be litigated in *Wilson*, but would be litigated only once; in a situation such as that in *Allee*, factual issues will arise numerous times. Arrests for violations of valid laws that the arrestees have not violated can dampen efforts to enforce civil rights. The federal courts, like their state counterparts, have generally denied injunctive relief because these suits carry too high a risk of duplication and delay.

340. 423 U.S. 362 (1976). *Accord*, Lewis v. Hyland, 554 F.2d 93 (3d Cir.), *cert. denied*, 434 U.S. 931 (1977).

341. The Court might also have fallen back on equity's refusal to enjoin illegal arrests, a position that would repudiate *Allee*.

"into the internal disciplinary affairs"[342] of the police department. *Rizzo* thus implied broadly that the lower courts should have disqualified themselves because federal courts should not interfere with local police authorities. *Rizzo*'s broad language, especially in the absence of either pending or threatened state charges, has created the erroneous impression that *Younger* counsels deference not only to state courts but also to state legislative policies.

Injunctions in "Hybrid" Cases

In its handling of the hybrid cases, the Court has significantly strayed from its prior decisions. In *Roe v. Wade*,[343] the Court gave brief consideration to the intervention petition of a medical doctor who had been charged with abortion offenses, but who sought relief as a "potential" future defendant. The Court found no merit in this distinction[344] and was unwilling to concede that a pending prosecution stymies contemplated conduct whose validity has not been adjudicated. As the Court considered the merits of the constitutional arguments pressed by other parties, its ruling on intervention had little practical effect.

The Court considered another hybrid situation in *Hicks v. Miranda*.[345] The plaintiff was the owner of a movie theatre that exhibited an allegedly obscene movie. The police, armed with warrants, seized copies of the film. Two days later, the plaintiff's employees were charged with obscenity. On that same day, the plaintiff received notice of a hearing to be held the next day to decide whether the seized movie should be declared obscene. The plaintiff presented objections to the hearing and refused to participate. The next day, a state judge declared the movie obscene and ordered a seizure of all copies found on the plaintiff's premises. Rather than appeal, the plaintiff instituted a federal civil rights action for injunctive and declaratory relief. State criminal charges were then filed against the plaintiff.

The Court ruled that *Younger* barred federal relief. First, the state court had already given the plaintiff a hearing on his film, even though the plaintiff had chosen not to participate. The Court correctly relied on the hearing already provided. The plaintiff had a full opportunity to participate in a hearing that gave him a prompt determination of the

342. 423 U.S. at 380.
343. 410 U.S. 113 (1973).
344. The Court evidently forgot its decision in Cline v. Frink Dairy, 274 U.S. 445 (1927). See text accompanying notes 248-52 *supra*.
345. 422 U.S. 332 (1975).

legal issues.[346] He had elected not to participate in the hearing and was unhappy with the court's decision, but the state court proceedings relieved him of his dilemma, for he had a judicial determination of his legal rights.

Second, the Court suggested that the plaintiff's employees were to receive a hearing in the form of a criminal trial, and that because their interests were "intertwined"[347] with his, their trial would vindicate his rights. This suggestion is incorrect. Both the employer and the employee may need a rapid determination of the legal issues, so that both may avoid the dilemma of either breaking the law with each showing of the movie or surrendering their constitutional rights. In *Hicks*, they had already had such a hearing.

Third, the Court suggested that, even if the interests of the employer and the employees were not intertwined, relief would be denied the employer. The Court observed that no *Younger* case had ever required that the state proceedings already be pending on the date federal suit is filed. The Court declared that a state charge may preempt a prior-filed federal action as long as no "proceedings of substance on the merits"[348] have taken place in the federal action. A contrary rule would "trivialize"[349] the principles of *Younger*. The Court thus casually obliterated an important component of *Ex parte Young*, which had emphasized the priority of the federal action as the basis for its precedence.[350]

The short-sightedness of the Court's opinion in *Hicks* is demonstrated in a companion case, *Doran v. Salem Inn, Inc.*[351] The three plaintiffs operated three taverns that featured "topless" dancing. When the county enacted an ordinance to forbid this form of entertainment, the three sought relief for a violation of the right of freedom of speech.

346. It could also be argued that the obscenity of a particular movie should not be adjudicated in equitable proceedings.

347. 422 U.S. at 348-49. *But see* Women's Services, P.C. v. Douglas, 653 F.2d 355 (8th Cir. 1981).

348. *Id.* at 349. The Court did not expand on a definition of this standard. In *Hicks*, the district court had denied a temporary restraining order. If the lower court had granted a temporary restraining order, conduct in reliance on that order should not have barred the federal plaintiff from further relief, if he had been subsequently arrested. Nonetheless, the amount of work done by the lower court would seem to be the same.

In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), *discussed in* text accompanying notes 350-51 *infra*, the lower court granted a preliminary injunction; the Court implied that conduct might resume after the grant of a preliminary injunction. It is unclear what result would obtain if the preliminary injunction had been denied.

349. 422 U.S. at 350.

350. See text accompanying note 233 *supra*.

351. 422 U.S. 922 (1975).

After suit was filed in federal court and a temporary restraining order denied, the prohibited conduct resumed in one of the bars, whose owner and his employees received criminal summonses. One month later, the federal district court granted preliminary injunctive relief to all three owners. On review, the Court approved a preliminary injunction in favor of the two owners who had complied with the ordinance until the district court had ruled. The Court ruled that the third owner should not have received a hearing on the merits because the federal suit was "in an embryonic stage"[352] when he received a state criminal summons. Thus, one may receive a federal resolution of the dilemma created by an allegedly unconstitutional law, but only by choosing to be impaled on one horn of the dilemma until the federal court has engaged in sufficient "proceedings of substance on the merits."[353]

The Fifth Circuit has carried non-intervention well beyond the limits of *Hicks-Doran*. In *Red Bluff Drive-In, Inc. v. Vance*,[354] the plaintiffs filed a federal suit against newly-enacted Texas obscenity statutes. The district court heard the merits and sustained the constitutionality of the statutes; the plaintiffs appealed. While their appeal was pending, other persons were charged with violations of the statutes. On appeal, the Fifth Circuit affirmed the district court's ruling on the merits in major part, but expressed doubts about the constitutionality of some provisions in the statute. The Fifth Circuit stated, however, that there should be abstention with regard to these constitutionally doubtful provisions, in part relying on the uncertain meaning of the statutes as a matter of state law. The district court had done substantial work on the merits before the state proceedings had been brought. Moreover, the plaintiffs in the federal suit were not related to the state criminal defendants. Nonetheless, the court stated that "Our Federalism" demanded that the state courts have the first opportunity to construe state law.[355]

Hybrid cases, in which the defendant has been convicted and wishes to repeat his or her conduct, have evoked a curious response from the Court. One would expect that the defendant would be denied equitable relief. The Court that decided *Hicks* and *Doran* to discourage races to the courthouse has departed from prior practice by being

352. *Id.* at 929.

353. One hopes the Court will not apply *Hicks-Doran* in the context of political speech. Under *Hicks-Doran*, the speaker would be obliged to postpone his or her speech in order to obtain the federal district court's ruling on the merits.

354. 648 F.2d 1020 (5th Cir. 1981).

355. *Id.* at 1035.

more generous to suitors who have already been convicted. In *Ellis v. Dyson*,[356] the plaintiffs were arrested for violating an anti-loitering law. They sought a writ of prohibition from the Texas Court of Criminal Appeals, which was denied on the ground that they should have raised their objection in the trial court. They then presented their constitutional arguments in the municipal court, which denied them on the merits. The plaintiffs entered a plea of nolo contendere, under which they would have the right to appeal and seek de novo trial in the county court. At this point, they abandoned the Texas court system and filed a federal civil rights action. The Court approved the availability of declaratory relief against the statute, although it did not resolve whether the pleas of nolo contendere would have res judicata effect on the constitutional issues.[357] In this regard, the Court's disposition paralleled the dissenter opinion in *Lektro-Vend*. Both opinions would allow a party to withdraw federal law issues from state court proceedings and to present them to a federal court at a later time.

Even if pleas of the parties in *Ellis* were not res judicata,[358] the *Roe-Hicks-Doran* doctrine arguably bars declaratory and injunctive relief. The plaintiffs had a full opportunity to challenge the state law in the state proceedings; their refusal to take that opportunity should not aid their federal case. If it would "trivialize" *Younger* to race to federal court before state charges are filed, it would also trivialize *Younger* to eliminate the state charges through a hasty guilty plea. The Court has thus created a loophole to the doctrine set forth in *Hicks* and *Doran*.

Wooley v. Maynard[359] followed the rule of *Ellis v. Dyson*. The plaintiffs, husband and wife who were Jehovah's Witnesses, objected to the motto, "Live Free or Die," stamped on their New Hampshire license plates. They thus covered the motto, a violation of state law for which the husband received three traffic citations. At each trial for the offense, he explained his religious objections to the motto, but was convicted. He and his wife then sought injunctive and declaratory relief. Once again, the Court regarded the suit as one for relief against a threatened prosecution when none was pending.[360] "[T]he suit is in no

356. 421 U.S. 426 (1975).

357. *Ellis* fits within the rule of *Steffel v. Thompson* because the plaintiffs alleged a threatened prosecution, but no prosecution was pending to resolve their constitutional objection. See notes 330-32 & accompanying text *supra*.

358. *See* 421 U.S. at 440-43 (Powell, J., dissenting).

359. 430 U.S. 705 (1977).

360. The Court distinguished Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which had required the federal plaintiff to appeal a state court judgment declaring the plaintiff's movie theatre a nuisance.

way 'designed to annul the results of a state trial' since the relief sought is wholly prospective."[361] The relief was retrospective, however, because it would reopen issues already litigated. The plaintiff had unsuccessfully litigated his constitutional argument in state court and, having no prosecution pending against him, had recourse to the federal district court. The *Wooley* Court ruled in the plaintiffs' favor on the merits, thereby denying collateral estoppel effect to the state court judgment.[362]

The Supreme Court's recent decision in *Allen v. McCurry*[363] does little to clarify *Ellis* and *Wooley*. In a pretrial motion, McCurry unsuccessfully argued that the court should suppress evidence in his state criminal trial. He later brought a section 1983 claim[364] for damages in federal court. The Supreme Court ruled that the federal courts must give preclusive effect to the state court judgment because McCurry had received a full and fair hearing in the state court on his constitutional rights. The Court noted, however, that it did not rule on whether an unused opportunity to raise an issue would bar further litigation by the same party.[365]

The question of the issue preclusion effect of an unused opportunity to raise an issue was also left unresolved in *Ellis*. Moreover, it is difficult to discern whether *Wooley* has been overturned. The husband in *Wooley* had unsuccessfully litigated his constitutional argument many times and, under *Allen*, should have been barred from further duplicative attempts. The *Allen* Court did not refer to *Wooley*, however, leaving the matter in some uncertainty. In both *Ellis* and *Wooley*, avoidance of duplicative litigation and maintenance of proper respect for the state judiciary are arguments against relitigation in state court.

The effect of *Allen* on a case such as *Doran* is also unclear. Later-filed criminal charges may bar injunctive relief until the state proceedings are concluded. Dictum in *Allen*, however, suggests that, because the federal plaintiff in *Doran* filed suit before the institution of the state charges, he would be able to relitigate his constitutional arguments in the federal district court.[366]

To resolve these problems, the Court must recognize that a pending prosecution does not necessarily eliminate the dilemma of one who

361. 430 U.S. at 711.

362. Perhaps the Court was influenced by the fact that the state proceedings had taken place in municipal court. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, Comment d, Illustration 7 (Tent. Draft No. 4, 1977).

363. 449 U.S. 90 (1980).

364. 28 U.S.C. § 1983 (1976).

365. 449 U.S. at 94 n.5.

366. *Id.* at 101 n.17.

desires to continue arguably protected conduct. Diligence in seeking relief, the "race to the courthouse," manifests the defendant's desire for the speedy relief that equity promises. In contrast, the party who has had questions answered or could have had them answered has a less compelling argument for injunctive relief. He or she no longer faces the dilemma that results from uncertainty.

If the Court desires to discourage the race to the courthouse, it can still protect the citizen by staying the prior-filed federal suit and awaiting speedy, definitive relief by the state courts. If the promise of speedy state relief is not fulfilled, the federal court should proceed to relieve the citizen of his or her uncertainty. That state charges are filed immediately after the federal suit does not assure the citizen of speedy relief; those quickly filed state charges may languish on the docket and stifle protected conduct.

Younger's Extension to State Civil Litigation

The application of *Younger* to state civil proceedings is uncertain. In many cases, the federal plaintiff has attempted to enjoin pending state civil proceedings. Fewer cases have considered injunctions against threats of civil proceedings. Even less attention has been given to the coordination of duplicative civil rights suits that seek only monetary relief.

Injunctions against Pending State Civil Proceedings

To what extent the *Younger* doctrine has application in civil litigation remains uncertain. The Court's analysis has proceeded on the assumption that, because *Younger* involved criminal proceedings, its application to civil proceedings should depend on the particular civil proceeding's resemblance or relation to criminal proceedings. Instead of relying on this assumption, the Court should be asking whether federal injunctive relief would be duplicative and, if so, whether duplication is necessary to protect constitutional rights.

In *Huffman v. Pursue, Ltd.*,[367] the Court's first post-*Younger* decision in this area, the local prosecutor had obtained a state court declaration that a movie theater was a nuisance because it had exhibited an obscene movie. Under local law, the theater would remain closed until the owner had posted a bond against re-establishment of the nuisance. The local statute could have been reasonably interpreted to mean that the bond would be given to ensure that no obscene movies would be

367. 420 U.S. 592 (1975).

shown again in the future.[368] Evidently working under the broader definition of "nuisance," the owner asked for federal injunctive relief rather than appealing the state court order. The Court justified a denial of equitable relief on the ground that the state nuisance proceedings were "in aid of and closely related to criminal statutes."[369] Accordingly, *Younger* would bar federal relief. The Court emphasized that the state appellate process, supervised by the United States Supreme Court, has been charged with the correction of errors in the interpretation of constitutional law.[370]

Huffman is a confusing application of *Younger* because it does not carefully consider the nature of the plaintiff's constitutional claim. The nuisance statute in *Huffman*[371] probably did not transgress the Constitution if it barred exhibition of movies already declared obscene in adversary proceedings.[372] If, however, the state statute clearly had required a bond against the exhibition of all obscene movies or had provided for closure for a set period of time, the owner would suffer prior restraint, which state appellate proceedings would merely lengthen. When the Court in *Mitchem v. Foster*[373] declared the Civil Rights Act to be an express exception to the Anti-Injunction Act, it was considering a state injunction that completely closed a bookstore because particular books, not necessarily all books in the store, were obscene. *Mitchum* would be a sterile decision if it held out the prospect of an injunction, but then required full exhaustion of state appellate remedies to prevent this blanket prior restraint.[374]

The ability to enjoin unconstitutional nuisance proceedings without exhausting state remedies was confirmed in *Vance v. Universal*

368. Only later was the state supreme court to rule in another case that the owner need refrain from exhibition of a particular movie previously declared obscene. *Id.* at 612 & n.23.

369. *Id.* at 604.

370. Without acknowledging it, the Court was espousing the philosophy of *Atlantic Coast*. 398 U.S. 281 (1970). See text accompanying notes 143-49 *supra*.

371. While *Huffman* was pending in the Supreme Court, the Supreme Court of Ohio had narrowly construed the Ohio nuisance statute in State v. A Motion Picture Film Entitled "Without a Stitch," 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), with a view to avoiding the constitutional difficulties that had concerned the *Huffman* trial court. 420 U.S. at 612 n.23.

372. The Court had denied relief in a previous case, upon considering an interim decision of the state court. Speight v. Slaton, 415 U.S. 333 (1974) (interim state court decision struck down a statute as an unconstitutional prior restraint when construed as in the case pending before the Court; remanded to the District Court for reconsideration in light of the interim state court proceeding to determine if full relief in state court could be obtained by motion to dismiss).

373. 407 U.S. 225 (1972).

374. In Sendak v. Nihiser, 423 U.S. 976 (1975), the Court remanded for reconsideration in light of *Huffman*.

Amusement Co.[375] In *Vance*, a movie exhibitor received advance word that the district attorney was planning to enjoin the further exhibition of obscene movies. The exhibitor sought injunctive and declaratory relief before the state proceedings could begin. The lower courts granted a declaration that the state injunctive proceedings would work a prior restraint on the exhibitor. Once the state court issued an injunction, the prosecutor could obtain ex parte temporary restraining orders against the screening of additional movies. The federal plaintiff could be held in contempt for violation of such orders even if the movies in question were ultimately found not to be obscene.

The Court approved this ruling on the merits, giving no consideration to *Huffman*. When the plaintiff filed, the state proceedings were not in progress, as in *Huffman*, and the prosecutor did not subsequently initiate proceedings. The Court's analysis of the merits indicates that it found the injunction remedy fatally defective as a prior restraint. Appeal of individual prior restraints would merely prolong and exacerbate the undesirable effects of a prior restraint machinery.

Trainor v. Hernandez[376] further illustrates the confusion about the "extension" of *Younger* to civil cases. State authorities, believing that Mr. and Mrs. Hernandez had committed fraud in their receipt of public welfare benefits, instituted a suit for the return of the disputed payments. The state officials also attached the Hernandezes' bank account, a procedure that, under Illinois law, could be accomplished without judicial approval. The citizens then obtained a federal court injunction against the attachment. The Supreme Court reversed and remanded. The Court maintained that *Younger* principles should apply because "[b]oth the suit and the accompanying writ of attachment were brought to vindicate important state policies . . . ."[377] That these policies could have been advanced through criminal charges also seemed to convince the Court that *Younger* should apply.[378] At the end of its opinion, however, the Court suggested that if Illinois law offered no means of interlocutory challenge to the attachment procedure,[379] a federal injunction would be proper. Thus, relief was denied on the

375. 445 U.S. 308 (1980).

376. 431 U.S. 434 (1977).

377. *Id.* at 444.

378. *Id.* at 446-47; *accord*, Juidice v. Vail, 430 U.S. 327, 337 (1977); Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976) (three-judge court), *vacated and remanded*, 432 U.S. 526 (1977); *see* Lecates v. Justice of the Peace Court, 637 F.2d 898 (3d Cir. 1980).

379. 431 U.S. at 447. Although not cited by the Court, its earlier decision in Lynch v. Household Finance Corp., 405 U.S. 538 (1972) supported this suggestion. 405 U.S. at 553-56.

grounds that the state had important interests to advance in the state proceedings. Nonetheless, if those proceedings would deny constitutional rights, federal injunctive relief would issue.[380]

In *Trainor*, the Court introduced a distinction that could weigh heavily on the victim of an allegedly illegal attachment. The debtor maintains that the initial seizure has denied and continues to deny property rights. If the defendant has had no procedural opportunity to raise this argument in the state courts, immediate federal relief is appropriate. If, however, state procedure allows one to raise the argument, the defendant must dutifully proceed through the state court system, possibly enduring further deprivation of his or her rights. Although federal courts do not promise to act more quickly than state courts, when the state courts have routinely processed attachment writs over a number of years, the state trial court may offer no redress, and only by appeal can a defendant obtain critical evaluation of routine and familiar practices. Rather than focusing on the real availability of relief, as in *Gerstein*,[381] the Court focused here on the theoretical availability of a remedy.

In *Moore v. Sims*,[382] the Court expanded its non-intervention doctrine, but continued to premise it upon a finding that the state civil proceedings should be in aid of criminal law enforcement. The Court also failed to clarify the extent to which state remedies must be available. The plaintiffs were suspected of abusing their children, who were summarily taken from the parents' custody. The state then filed suit to appoint a conservator for the children. The parents' federal suit raised the following constitutional objections in three areas: first, state authorities' temporary custody; second, the procedures for appointing a permanent conservator; and third, the placement of their names in a national computer network of abusive parents.[383]

The district court returned interim custody to the parents. The parents did not pursue a state interlocutory appeal of the interim custody decision. Their state writ of habeas corpus was denied because of improper venue, leaving them free to refile. Instead of disapproving the return to custody when state remedies had not been fully pursued,

380. On remand, the district court concluded that Illinois lacked an adequate procedure to challenge the validity of the attachment, and the district court accordingly entered a judgment, *sub nom.* Hernandez v. Finley, 471 F. Supp. 516 (N.D. Ill. 1978), which the Supreme Court affirmed, *sub nom.* Quern v. Hernandez, 440 U.S. 951 (1979).

381. Gerstein v. Pugh, 420 U.S. 103 (1975). For a discussion of *Gerstein*, see text accompanying notes 296-303 *supra*.

382. 442 U.S. 415 (1979).

383. 438 F. Supp. 1179, 1189-94 (1976).

the Court seemed to reason that, having obtained this relief, the parents were obliged to present all other constitutional attacks in state court.[384]

The second group of constitutional objections could be asserted in defense of the conservatorship proceedings and therefore the Court had a predictable and sound reason for denying federal relief. There was no plausible argument that state court resolution would itself deny constitutional rights. Nonetheless, the Court buttressed its conclusion with the unnecessary argument that the child abuse proceedings were in aid of the enforcement of criminal statutes.[385]

The Court's treatment of the third issue suggests a broad range of nonintervention that may be inherent in state civil proceedings. The civil nature of the proceedings in *Moore* frustrated the parents' efforts to enjoin the state from placing their names in a national computer network of child abusers. The alleged unconstitutionality of this practice did not affect the fairness of the proceedings to appoint a conservator. In addition, a successful attack on the practice would not defeat the state's efforts to intervene in the parent-child relationship.

Under Texas procedure, however, the state court had authority to entertain a wide range of counterclaims, including the parents' attack on the computer system. The Court disapproved federal consideration of this claim because the state court could consider it as a counterclaim. In a state that permits a liberal counterclaim practice, this analysis would draw into state court a wide variety of constitutional issues once the state has brought an enforcement action. *Moore* thus coordinates overlapping proceedings more than it forbids injunction of state court proceedings because the plaintiffs were seeking to enjoin executive officials from extra-judicially labeling them child abusers.

From the standpoint of coordinating duplicative litigation, this aspect of *Moore* has support in policy and precedent. The Court's later decision in *Allen v. McCurry*, however, may lessen the effect of *Moore*'s effort to avoid duplication. Under *Allen*, the parents, although required under federal law to file a state counterclaim, would be able to "reserve" their constitutional arguments. Thus, the parents would be obliged to litigate first in the state court system, but would have the freedom to return to federal court and avoid the preclusive effect of a state court judgment on the counterclaim.[386]

The Court has introduced additional confusion by seeming to approve an injunction against state proceedings even when the proceed-

384. 442 U.S. at 431-32.
385. *Id.* at 423.
386. *See* 449 U.S. 90, 101 n.17 (1981).

ings do not deny constitutional rights. In *Town of Lockport v. Citizens for Community Action*,[387] citizens sought a federal injunction to put into effect a disputed county charter. County officials brought a later suit in state court to prevent the charter from going into effect. The federal district court enjoined prosecution of the state suit. In a footnote, the Court declared that *Younger* did not require district court deference to the state suit.[388] As the federal suit was filed first, the federal judge did not have to abandon jurisdiction.

The Court's decisions have led the lower courts to focus on whether state civil proceedings are sufficiently similar to criminal proceedings, when the relevant question is whether the state civil proceedings deny constitutional rights. In *Henry v. First National Bank*,[389] a recent Fifth Circuit decision, blacks had organized boycotts and picketing of white-owned businesses in protest of racial discrimination. The white merchants sued in a Mississippi state court for violation of the state's antitrust law[390] and recovered a $1.25 million judgment and an injunction against the protestors' activities. In Mississippi, an injunction is effective immediately upon entry and a judgment for damages becomes executory upon entry unless the appellant posts bond for 125% of the judgment. Because a bond in this amount was so onerous that it would have bankrupted some of the defendants, the state court defendants sought a stay order from the trial court and from the Mississippi Supreme Court, both of which denied relief. The defendants then filed a federal suit, in which they sought relief from the bond requirement while they pressed their appeal of the state judgment. They argued that executing the injunction and the damages award pending appeal violated constitutional rights. The Fifth Circuit upheld a grant of relief that stayed execution of the state judgment even though no bond had been posted. The court observed that *Younger* was not generally applicable to all civil litigation and that the Supreme Court had limited *Younger* to cases in which important state interests were at stake. Moreover, the Supreme Court had not applied *Younger* to a case involving only private parties. According to the Fifth Circuit, the State of Mississippi had the limited interest in the case of providing a forum for the resolution of private disputes. The federal order did not inter-

387. 430 U.S. 259 (1977).

388. *Id.* at 264 n.8.

389. 595 F.2d 291 (5th Cir. 1979).

390. The Fifth Circuit had earlier ruled that the filing of such a suit by private parties did not violate constitutional rights. Henry v. First Nat'l Bank, 444 F.2d 1300 (5th Cir. 1971). Proposed enforcement of the judgment sufficiently implicated the state to satisfy the state action requirement.

fere because the state courts were free to process the case on the merits.[391] The federal injunction merely stayed execution of the trial court's judgment. The court failed to discern the true basis of intervention, even though it came to the right result.

In a later case, the Fifth Circuit came to an opposite but equally correct result, once again failing to perceive the correct justification for its result, because it engaged in the line of analysis introduced in *Huffman*. In *Gresham Park Community Organization v. Howell*,[392] various individuals picketed and boycotted a liquor store that opened for business in their neighborhood. The owner of the liquor store obtained a temporary restraining order from the state court to prohibit further interference with his business. The protestors were heard in state court on their motion to dissolve the order and entered an appeal to the state's intermediate appellate court, which dismissed for lack of jurisdiction. Rather than appeal to the state's supreme court, which clearly had jurisdiction, the protestors sought federal injunctive relief against the temporary restraining order.

Recognizing that only private parties were involved in the state litigation, the court declared that the liquor store owner's request for a temporary restraining order was in aid of a state criminal law that prohibited picketing and boycotts. As the private party was attempting to prevent a crime under state law, the federal court should not have enjoined the temporary restraining order. The Fifth Circuit should have concentrated, instead, on whether the state procedures denied the federal plaintiffs their constitutional rights. Unlike the citizens in *Henry*, the citizens in *Gresham Park* were trying to avoid the state proceedings. They did not assert that an appeal through the state system would deny them their constitutional rights. Moreover, they did not attempt to use their state appellate remedies.

The Third Circuit also has had difficulties in applying *Younger* to pending civil matters between private parties. In *Johnson v. Kelly*,[393] the plaintiffs were record owners of real estate that had been sold for delinquent taxes to purchasers who then brought quiet-title actions in state court. The record owners, contending that the procedure for selling their property was constitutionally defective, requested federal injunctive relief against the state court actions. The Third Circuit granted relief because the state was not a party to the quiet-title action

391. 595 F.2d at 301.

392. 652 F.2d 1227 (5th Cir. 1981).

393. 583 F.2d 1242 (3d Cir. 1978). *Contra*, Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).

and because the state had no important interests at stake. The court could have found that the state had an important interest in maintaining tax sales, and it should have found that the quiet-title actions did not deny constitutional rights. The record owners had full opportunity to present their constitutional arguments in the state proceedings. The Third Circuit promoted duplicative proceedings because it could find no state interest akin to that behind the enforcement of the criminal law.

The Seventh Circuit took the correct approach in *Cousins v. Wigoda*.[394] In 1972, those elected as Illinois delegates to the Democratic National Convention were challenged by a group who claimed that the elected delegates did not satisfy party qualifications. The elected delegates filed in state court to restrain the challengers, who then sued in federal court, alleging that the state suit infringed on first amendment rights. The Seventh Circuit noted that the state proceedings offered full opportunity for the challengers to present their constitutional arguments. The court refused to assume that the trial and appeal process would deprive the challengers of their first amendment rights.[395]

Administrative Hearings

The Court has given incomplete guidance on whether a federal court should enjoin pending state administrative hearings and on whether the citizen may resort to federal court for injunctive relief after administrative hearings have concluded. In the early case of *Prentis v. Atlantic Coast Line Co.*,[396] the railroads asked for a federal injunction invalidating maximum rates established by the state utility commission. The Court denied relief because when the railroads filed suit, they could have had review in the state supreme court, which would have stayed the effect of the railroad commission's order.[397] In dictum, the Court stated that, once the rates had been fully approved by the state courts, the railroads could seek federal intervention against the enforcement of the rates.[398] The Court further assumed that once enforcement began, even in proceedings before the administrative agency, a federal court could not intervene, just as it could not intervene in

394. 463 F.2d 603 (7th Cir. 1972); *see also* Worldwide Church of God, Inc. v. California, 623 F.2d 613 (9th Cir. 1980).

395. Justice Rehnquist denied an emergency stay of the Seventh Circuit's order. 409 U.S. 1201 (1972).

396. 211 U.S. 210 (1908).

397. *Id.* at 228.

398. *Id.* at 230.

state court proceedings.[399]

Gibson v. Berryhill,[400] a 1973 Supreme Court case, followed the assumption in *Prentis* that intervention in enforcement proceedings would be impermissible, but found an exception to justify the grant of relief. The federal plaintiffs were optometrists employed by a corporation. The state optometry board argued that the practice of this profession in the employ of a corporation constituted unauthorized practice. The board obtained a state injunction against the corporation and then notified the individual optometrists of administrative hearings to discipline them. The optometrists brought a federal injunctive suit, alleging that the individual members of the board were biased because they had a personal financial stake in the outcome of the disciplinary proceedings. The Court approved injunctive relief, although any board determination would be reviewed de novo in the state court system. Revocation of the plaintiffs' licenses would cause such bad publicity for them and consequent damage to their professional reputation that correction of a biased decision would not give them complete relief.[401]

The Third Circuit's recent decision in *Garden State Bar Association v. Middlesex*,[402] which builds upon *Gibson*, opens up the potential for even greater intervention into enforcement proceedings. One of the petitioners, an attorney, maintained that certain provisions of the state's attorney discipline rules as well as pending administrative hearings to investigate his alleged violations of these rules infringed his first amendment rights. The district court had abstained on the basis of *Younger*, but the Third Circuit reversed, reasoning that *Younger* abstention contemplates that the petitioner have a reasonably speedy forum to give him an authoritative resolution of his constitutional arguments. The Third Circuit found that the local ethics panel, constituted in part of non-lawyers, could not give authoritative consideration to the petitioner's constitutional arguments. Accordingly, the court found no sound basis in *Younger* for deference to a proceeding that could not give the requested relief. As administrative agencies are not generally accorded the authority to entertain constitutional arguments,[403] this line of reasoning has great potential for reversing in practice the deference shown by *Prentis* to administrative enforcement

399. *Id.* at 225-26. *Prentis* assumed that the Anti-Injunction Act would bar such relief. Mitchum v. Foster, 407 U.S. 225 (1972), removed this premise of *Prentis*.

400. 411 U.S. 564 (1973).

401. *Id.* at 577 n.16; *accord*, Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978).

402. 643 F.2d 119 (3d Cir.), *aff'd on rehearing*, 651 F.2d 154 (3d Cir. 1981). *But see* Simopoulos v. Virginia State Bd., 844 F.2d 321 (4th Cir. 1981).

403. *See* Johnson v. Robinson, 415 U.S. 361 (1974).

proceedings.[404]

When the administrative proceedings are of an enforcement nature, the citizen may be obliged to exhaust state judicial remedies after the administrative hearing has terminated,[405] a possibility which *Prentis* supports.[406] On the other hand, the Constitution does not ensure Supreme Court review of state administrative proceedings as it ensures Supreme Court review of state judicial proceedings.[407] Federal court intervention at the conclusion of administrative proceedings does not upset the division of jurisdiction worked out by Congress in the way that intervention in pending judicial proceedings disrupts the legislative plan. When a citizen challenges decisions made without formal hearing, he or she may immediately resort to federal court.[408] The addition of a hearing should not force a citizen into state court, unless the provision for an administrative hearing with judicial review eliminates a claim that enforcement denies constitutional rights.[409] The answer to

404. On remand, the court stressed that it was not approving an injunction; it was disapproving abstention. It suggested that both proceedings proceed concurrently. 651 F.2d at 158.

405. *E.g.*, Peterson v. Sheean, 635 F.2d 1335 (8th Cir. 1980); Rosenthal v. Carr, 614 F.2d 1219 (9th Cir. 1980); Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3d Cir. 1977); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); ACLU v. Bozardt, 539 F.2d 340 (4th Cir. 1976); Anonymous v. Association of the Bar, 515 F.2d 427 (2d Cir. 1975). The courts have made the same assumptions in disciplinary proceedings for other professions and for licensed occupations. *See* Leigh v. McGuire, 613 F.2d 380 (2d Cir. 1979); Munson v. Janklow, 563 F.2d 933 (8th Cir. 1977); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977); Louisiana State Bd. of Medical Examiners v. Howze, 445 F.2d 586 (5th Cir. 1971); *see also* North v. Budig, 637 F.2d 246 (4th Cir. 1981).

406. 211 U.S. at 225-26. The Third Circuit's recent decision in New Jersey Education Ass'n v. Burke, 579 F.2d 764 (3d Cir. 1978), illustrates confusion with regard to when rulemaking sufficiently concludes that a federal challenge is appropriate. The state of New Jersey changed its regulations concerning qualifications of teachers, tenured as well as untenured, in bilingual education programs. A plaintiff class including all affected teachers filed a statutory appeal in the New Jersey state court. The teachers also filed in federal district court for injunctive relief directed at the state's education commissioner. The Third Circuit approved injunctive relief because such relief would not interfere with the enforcement of the criminal law or with any equally important state interest. The Third Circuit further stated that "the adjudication of the constitutionality of administrative regulations is not a 'core' function of the state judiciary." *Id.* at 768.

The Third Circuit should have denied relief for the reason set forth in *Prentis*: Until approved by the state judiciary, the rule did not deprive anyone of a job. After state proceedings were complete, *Prentis* would allow suit to be brought in federal court.

407. See quotation in text accompanying note 145 *supra*.

408. *See, e.g.*, Dixon v. Love, 431 U.S. 105 (1977). This view has received extensive criticism. *See* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974). There have been recent decisions that erode the doctrine. Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978).

409. The Court did not decide this question because the state authorities pressed for a

this problem has not yet been resolved by the post-*Younger* decisions.

Injunctions against Threatened State Civil Proceedings

In *Ex parte Young*[410] and in *Frink Dairy*,[411] the state had civil remedies at its disposal, and the Court gave no indication that it would treat threatened civil proceedings differently from threatened criminal proceedings. If state civil remedies discourage assertion of constitutional rights, federal relief is appropriate, as confirmed in a recent Fifth Circuit case, *Morial v. Judiciary Commission*.[412] In *Morial*, the plaintiff, a judge of the Louisiana Court of Appeal, contemplated candidacy in the mayoral election for New Orleans. Louisiana law would have required him to resign his office in order to qualify as a candidate. The state code of judicial ethics also required resignation, and violation of the rules in question might have led to judicial disciplinary proceedings. The Fifth Circuit found no *Younger* objection to a federal suit challenging this requirement when no state proceedings were pending.

> *Younger* principles, even were we to assume them applicable to disciplinary proceedings against a judge, . . . have no application when state proceedings have not been initiated prior to substantial proceedings on the merits in federal court. . . . *Younger* principles are not invoked by the mere fact that federal relief has an impact on state governmental machinery; even in its quasi-criminal extensions, *Younger* dismissal is called for only in those circumstances where successful defense of a state enforcement proceeding, initiated before substantial federal proceedings on the merits had occurred, would fully vindicate the federal plaintiff's federal right.[413]

The court then rejected the plaintiff's federal claim on the merits. The plaintiff resigned his office. The state court subsequently followed the *Ex parte Young* tradition[414] by refusing to disqualify the judge as a candidate on the basis of his campaigning while still in office.[415] His good faith and speedy prosecution of the federal suit gave him immunity from a charge that he violated the election laws and disqualified himself from candidacy.

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disposition on the merits. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).

410. See notes 225-47 & accompanying text *supra*.

411. See notes 248-52 & accompanying text *supra*.

412. 565 F.2d 295 (5th Cir. 1977).

413. *Id.* at 299; *accord*, Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980).

414. See text accompanying note 244 *supra*.

415. Kiefer v. Morial, 351 So. 2d 1216 (La. App. 1977), *mandamus denied*, 352 So. 2d 1023 (La. 1977), 353 So. 2d 285 (La. 1977).

Duplicative Civil Rights Actions for Damages

If a federal plaintiff does not demand injunctive relief, *Younger* should be no direct obstacle to the exercise of federal jurisdiction. Nonetheless, the Court's recent recognition[416] that duplicative litigation should be discouraged may be extended to civil rights cases.

In *Caldwell v. Camp*,[417] the plaintiff had been arrested for possession of narcotics. The state instituted proceedings for forfeiture of the plaintiff's automobile, where the narcotics had been found. Asserting that the forfeiture statute was unconstitutional, the plaintiff sued in federal court for injunctive relief and damages. The Eighth Circuit dismissed the injunction claim because the forfeiture proceedings were in aid of criminal law enforcement. The court also dismissed the legal action without prejudice, reasoning that a successful damage action would disrupt the forfeiture proceedings as much as would an injunction. The court came to the right result, but should have based its decision on the desire to minimize duplicative litigation. The suit for damages, pressed at a later time, may also interfere with the state's enforcement of the criminal law even when the federal damage action is stayed.

The Second Circuit reached a similar result in *Martin v. Merola*.[418] The plaintiffs had been charged in state court, and the state prosecutors made inflammatory charges to the press that the plaintiffs were linked to organized crime. The plaintiffs sought damages for the prosecutors' denial of a fair trial. The Second Circuit approved a dismissal without prejudice, reasoning that until the criminal trial had concluded, it would be difficult to assess the plaintiffs' claims on the facts. Moreover, the court suggested that "it would offend the principle of comity for a federal district court to inquire into plaintiffs' ability to secure a fair trial in a pending state prosecution."[419]

The Fifth Circuit took a contrary view in *Keyes v. Lauga*.[420] The plaintiff had been arrested for assault on a peace officer and for resisting arrest. She brought suit for false arrest, illegal search, and excessive use of force and recovered a substantial judgment. The state charges were still pending at the time the civil rights claims went to

416. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

417. 594 F.2d 705 (8th Cir. 1979).

418. 532 F.2d 191 (2d Cir. 1976); *accord*, Singleton v. City of New York, 632 F.2d 185, 193 (2d Cir. 1980).

419. *Id.* at 194-95.

420. 635 F.2d 330 (5th Cir. 1981).

trial. Although some aspects of her civil rights action could arise in a trial of the criminal charges, the court found abstention inappropriate. *Younger*, it observed, barred only federal injunctive or declaratory relief; the Supreme Court has not yet extended it to damage actions. The Fifth Circuit did not find any of the Court's other abstention doctrines a bar to the damage action, although it gave no explanation for this conclusion.

If the state charges in *Keyes* had been allowed to languish, the Court's refusal to abstain is understandable. Abstention to avoid duplicative litigation presupposes that the other action is proceeding to judgment. If, however, the Fifth Circuit refused to stay any and all damage actions in deference to pending state criminal charges, it may have improperly authorized duplicative litigation.

The courts that have stayed damage actions have presumed or implied that the plaintiff would be free to relitigate constitutional arguments presented in the parallel state action.[421] The Court's recent decision in *Allen v. McCurry*,[422] however, may not allow such relitigation. If *Allen* disallows relitigation, stays of damage actions may no longer be forthcoming.[423]

Conclusion

If the *Younger* doctrine is to become more predictable and satisfactory, the Court must give clearer guidance on the broader themes discussed in the first half of this Article. Federal relief should be denied when it promises to duplicate the work of the state courts without freeing the citizen from oppression. When, however, state process is oppressive or promises to be inadequate, duplication may be necessary to avoid these evils. The Court's language in some of its most important pronouncements had been misleading. Significant and inappropriate changes have been made in the treatment of the hybrid cases. The Court should temper the *Hicks-Doran* rule to grant federal relief when it is needed. The citizen should not be obliged to cease all arguably protected conduct to obtain the necessary pre-enforcement judicial review.

The Court's lack of guidance has been more apparent in relation to state civil proceedings. Only rarely do state civil proceedings deny constitutional rights. Avoidance of duplication should be an important

421. See cases cited in text accompanying note — *supra*.
422. See notes 362-65 & accompanying text *supra*.
423. *See* Parkhurst v. Wyoming, 641 F.2d 775 (10th Cir. 1981).

goal,[424] unless the protection of constitutional rights, by its nature, calls for duplication. The Court must decide whether these cases are so special that duplication is permissible. *Mitchum v. Foster* had suggested an affirmative answer, but the Court's most recent pronouncement on duplication in civil rights proceedings, *Allen v. McCurry*, is inconclusive, although it purports to disfavor duplication.[425]

The most troublesome aspect of *Younger* is the amorphous nature of "comity," a slogan that has no logical stopping place and few, if any, historical boundaries other than in the choice of law context. A belief that the states should function in their own separate ways can justify total self-denial by the federal courts of their assigned jurisdiction. Comity can justify a refusal to exercise jurisdiction, even when, as in *Rizzo v. Goode*, the exercise would not duplicate or interfere with the work of the state courts. Comity, which can be invoked when it is least expected, seems only to confuse the difficult and important issues that arise in the co-ordination of duplicative litigation and the protection of individual rights.[426]

424. *See* University of Okla. Gay People's Union v. Board of Regents, 661 F.2d 858 (10th Cir. 1981).

425. Professor Field provides a summary of the reasons why civil proceedings should be treated differently under *Younger*. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 715 (1981).

426. After this Article was set in print, the United States Supreme Court decided *Fair Assessment in Real Estate Ass'n v. McNary*, 50 U.S.L.W. 4017 (Dec. 1, 1981). The petitioners brought a federal damages action to recover for state officials' allegedly discriminatory action in the assessment of taxes, which the petitioners had already paid. As they sought neither injunctive nor declaratory relief, the Tax Injunction Act, 28 U.S.C. § 1341 (1976), would not seem to bar relief. Congress' historical concern has been to allow the collection of state taxes to proceed unimpeded, with recourse to the taxpayer only after he or she has made payment. The Court in *McNary* relied on the *Younger* comity concept to bar the federal suit, reasoning that any award of damages would rest on a finding of unconstitutional conduct. As a federal court may not enjoin or give declaratory relief against the collection of state taxes, it should not award damages that would rest on the functional equivalent of a declaration and would discourage the efforts to levy taxes. Thus, the Court took the unusual step of barring a federal damage action with respect to taxes that had already been paid.

This line of reasoning could have an enormously broad sweep. Although the damage action does not have the direct effect of the injunction or the declaration, it has been presumed and hoped to have a deterrent effect, that is, to shape conduct. Moreover, the declaratory nature, albeit implicit, of a civil judgment for damages is neither new nor startling. By the Court's reasoning, almost all federal damage actions for the deprivation of civil rights might offend a principle of comity. For example, a damage suit for a strip search conducted incident to a routine traffic stop would be barred from the federal courts, inasmuch as it could have a deterrent effect upon police practices.

But the Court was unwilling to say to what extent comity bars damage actions. It held open the prospect that a damage action for discriminatory taxation on the basis of race might be heard in a federal court. *Id.* at 4019 n.4. One can only speculate as to the basis of

this reservation. Perhaps the Court believed that *McNary* involved difficult factual issues that would be resolved in part under local law. *McNary* well illustrates the sweeping possibilities of comity, from which a court recoils, for no articulated reason, even as it decides a particular case.